(22,605)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 261.

LEM WOON, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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1 & 2 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Appeal from the Supreme Court of the State of Oregon.

George J. Cameron, District Attorney; Joseph J. Fitzgerald, Deputy District Attorney, and Dan J. Malarkey, Attorneys for Defendant in Error:
Ralph E. Moody, John F. Logan, and Frank F. Freeman Attorneys for Plaintiff in Error.

3 Case No. 7173.

Drawer No. 716.

Transcript.

STATE OF OREGON, Plaintiff & Respondent,
vs.
LEM WOON, Defendant & Appellant.

Appeal from the Circuit Court, Multnomah County.

Before Honorable John S. Cleland, C. U. Gantenbein & Earl C. Bronaugh, Judges.

Dan J. Malarkey, Special Prosecutor & John W. Stevenson, Attorneys for Plaintiff & Respondent.
Frank Freeman, John F. Logan, Henry E. McGinn & R. E. Moody, Attorneys for Defendant & Appellant.

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Be it remembered, that heretofore on the 1st day of April, 1908, there was filed in the office of the Clerk of the Circuit Court of the State of Oregon for Multnomah County an True Information in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON
vs.
LEM WOON and YEE GUENG, Defendant-.

Lem Woon and Yee Gueng are accused by the District Attorney of the Fourth Judicial District of the State of Oregon, for the County of Multnomah, by this information, of the crime of murder in the first degree committed as follows:

The said Lem Woon and Yee Gueng on the 7th day of March, A. D., 1908, in the County of Multnomah and State of Oregon then and there being, did then and there unlawfully, purposely and feloniously and of their deliberate and premeditated malice, kill and murder one Lee Tai Hoy, by then and there unlawfully, purposely and feloniously and of their deliberate and premeditated malice, shooting him the said Lee Tai Hoy with a certain pistol which was then and there loaded and charged with gun powder and leaden bullets, by them and there unlawfully, purposely and feloniously and of the deliberate and premeditated malice of them, the said Lem Woon and Yee Gueng, pointing, aiming and discharging said pistol, so loaded as aforesaid, at, toward and against him, the said Lee Tai Hoy, then and thereby inflicting in and upon the body of him, the said Lee Tai Hoy, certain mortal wounds of which said mortal wounds he, the said Lee Tai Hoy, thereafter, to-wit: on the 7th day of March, A. D., 1908, died, and so in the manner and by the means aforesaid, they, the said Lem Woon and Yee Gueng unlawfully, purposely and feloniously, and of their deliberate and premeditated malice, killed and murdered him, the said Lee
6 Tai Hoy, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at the City of Portland, in the county aforesaid, this 1st day of April, A. D. 1908.

Witnesses subpœnaed, sworn and examined before the District

Attorney for the State of Oregon. Fred J. Zeigler, Lee Long, Thomas Coleman, John H. Price, Lim Lung, Chin Ging Yuk, Carroll H. Tichenor, William Jones, Thomas Kay.

JOHN MANNING,
District Attorney,
By JOHN H. STEVENSON, *Deputy.*

A True Information,
JOHN MANNING,
District Attorney.

7 And Afterwards on Monday the 6th day of April, A. D. 1908, the same being the 1st judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, by Bert E. Haney, Deputy District Attorney, and the defendants appearing in person in custody of the Sheriff and an Information having been heretofore to-wit: on the 1st day of April, 1908, duly presented to this Court by the District Attorney of the Fourth Judicial District of the State of Oregon, for Multnomah County, and filed with the Clerk charging said defendants with the crime of murder in the first degree, committed in said County and State on the 7th day of March, 1908.

Said defendants now duly arraigned by the District Attorney under the Court's direction, reading said Information and interpreted the same by an interpreter to the defendants, and delivering to said defendants a certified copy of said Information and the endorsements thereon, including the list of witnesses endorsed on said Information. The Defendants states that they are correctly named, and they are allowed until the 9th day of April, 1908, at 2 o'clock P. M. in which to move, demur, or plead to the information.

(Signed) JOHN B. CLELAND, *Judge.*

8 And Afterwards, on Thursday the 9th day of April, A. D. 1908, the same being the 4th Judicial day of said term of said Court there was rendered and entered in said Court an order in words and figures as follows, to-wit:

(Title.)

Now at this time on motion of John F. Logan, of attorneys for defendants, it is ordered that said defendants have 5 days further time in which to move, demur or plead to the information herein.

(Signed) JOHN B. CLELAND, *Judge.*

9 And afterwards on Tuesday the 28th day of April, A. D. 1908, the same being the 19th judicial day of said term of said court there was rendered and entered in said Court an order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, by Bert E. Haney, Deputy District Attorney, and the defendants appearing in person in custody of the Sheriff and by Frank Freeman, their attorney, and the defendants having been heretofore duly arraigned upon this Information the defendants by and through an interpreter each for himself pleads that he is not guilty of the crime charged in this Information.

It is ordered that the plea of not guilty of each of the defendants be and the same is hereby entered of record.

(Signed) C. U. GANTENBEIN, *Judge.*

10 And afterwards on Friday the 12th day of June, A. D. 1908, the same being the 10th Judicial day of said Term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

Now at this time the above entitled criminal action comes regularly on for trial before Hon. Earl C. Bronaugh, Judge. The State appearing by Dan J. Malarkey, Special Prosecutor, and by John H. Stevenson, Deputy District Attorney.

The defendant Lem Woon appearing in person in custody of the Sheriff and by John F. Logan and Frank F. Freeman, his attorneys.

The empanelling of a jury is regularly proceeded with and one juror having been examined and accepted and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

11 And afterwards on Saturday the 13th day of June, A. D. 1908, the same being the 11th Judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with and five jurors having been examined and accepted and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled cause be continued until Monday June 15th, 1908, at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

12 And afterwards on Monday the 15th day of June, A. D. 1908, the same being the 12th Judicial day of said term of said Court there was rendered and entered in said court an order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of Saturday, June 13, 1908, and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with, four jurors having been examined and accepted.

Upon motion of Dan J. Malarkey, Special Prosecutor for the State, it is ordered by the Court that J. J. Fitzgerald be entered as an attorney of record on behalf of the State.

And the hour of adjournment having arrived it is ordered by the Court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

13 And afterwards on Tuesday the 16th day of June, A. D. 1908, the same being the 13th Judicial day of said term of said Court there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly proceeded with.

The empanelling of a jury is again regularly proceeded with, and now comes a jury as follows, to-wit: J. H. Barton, W. E. Brooks, Alonzo Perkins, H. W. Sitton, W. W. George, H. C. Haack, Alfred Anderson, F. W. Carroll, James Anderson, Wm. B. Cobb, Wm. J. Ferrell and H. R. Beckwith, twelve good and lawful men duly sworn to well and truly try said cause.

After hearing the allegations of respective counsel, and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

14 And afterwards on Wednesday the 17th day of June, A. D. 1908, the same being the 14th Judicial day of said Term of said Court, there was rendered and entered in said Court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal action is regularly

proceeded with. After hearing the evidence of part of the witnesses on behalf of the State, and the hour of adjournment having arrived.

It is ordered by the Court that the further hearing of the above entitled criminal cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

15 And afterwards on Thursday the 18th day of June, A. D. 1908, the same being the 15th Judicial day of said term of said court there was rendered and entered in said court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled cause is regularly proceeded with. After hearing the evidence of part of the witnesses on behalf of the State, and the hour of adjournment having arrived.

It is Ordered by the court that the further hearing of the above entitled criminal action be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

16 And afterwards on Friday the 19th day of June, A. D. 1908, the same being the 16th Judicial day of said term of said court, there was rendered and entered in said court an Order in words and figures as follows to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled cause is regularly proceeded with. After hearing the evidence of the remainder of witnesses on behalf of the State, counsel for the State rests its case. And the evidence of part of defendant's witnesses, and the hour of adjournment having arrived.

It it ordered by the court that the further hearing of the above entitled cause be continued until tomorrow morning at 9:30 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

17 And afterwards on Saturday the 20th day of June, A. D. 1908, the same being the 17th Judicial day of said term of said court, there was rendered and entered in said court an Order in words and figures as follows, to-wit:

(Title.)

At this time comes the same parties and jury as of yesterday and the further hearing of the above entitled criminal cause is regularly

proceeded with. After hearing the evidence of the remainder of defendant's witnesses, counsel for the defendant rests his case. After hearing the arguments of respective counsel and the instructions of the court to the jury, the jury retired in charge of a sworn office- to deliberate upon their verdict, and after a deliberation of about fifteen minutes, return into open court in charge of said officer, and through their foreman present their verdict which reads as follows, to-wit:

"We the jury in the above entitled criminal action, find the defendant Lem Woon, guilty as charged in the information.

H. W. SITTON,
Foreman."

Whereupon the jury is excused from the further consideration of the above entitled criminal cause and the jury is discharged from further attendance upon the court for the June term. And the defendant is remanded in to the custody of the Sheriff.

(Signed) EARL C. BRONAUGH, *Judge.*

18 And afterwards on the 20th day of June, 1909, there was filed in said office a verdict in words and figures as follows, to-wit:

(Title.)

We, the jury in the above entitled criminal action, find the defendant, Lem Woon, guilty as charged in the information.

H. W. SITTON,
Foreman.

19 And afterwards on the 1st day of August, 1908, there was filed in said office a motion for a new trial in words and figures as follows to-wit:

(Title.)

Comes now the defendant Lem Woon, and moves the court for an order setting aside the judgment hereinbefore made and entered in this court and cause, and for an order awarding the defendant Lem Woon a new trial, upon the ground and for the following reasons and causes, to-wit:

I.

Irregularity in the proceedings of the Court by which the said defendant was prevented from having a new trial, that said irregularities consist specifically in permitting and allowing the district attorney and special assistant district attorney to exhibit incompetent, irrelevant and immaterial objects before the jury to the prejudice of this defendant.

II.

Irregularities in orders of the Court by which the said defendant was prevented from having a fair trial.

III.

Insufficiency of the evidence to justify the verdict, and that such evidence is against the law.

IV.

Error in law occurring at the trial and excepted to by this defendant, which errors are most specifically set out in the transcript of the evidence which is hereby referred to and made a part of this motion, insufficiency of the evidence to justify the verdict, and that such evidence is against the law.

FRANK FREEMAN,
JOHN F. LOGAN,
Attorneys for Defendant.

20 And afterwards on Thursday the 1st day of October A. D. 1908 the same being the 21st Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows, to-wit

(Title.)

Now at this time comes on for hearing the motion of the defendant Lem Woon, for a new trial and to set aside the verdict of the jury returned hereinbefore and entered in this court and cause. The State of Oregon appearing by Dan J. Malarkey, private prosecutor. The defendant appearing in person in custody of the sheriff and by H. E. McGinn and R. E. Moody his attorneys. After hearing the arguments of respective counsel and the court being fully advised in the premises

It is ordered that the said motion be and hereby is denied and that judgment will be pronounced upon the defendant Lem Woon on Monday, October 5, 1908 at 2 o'clock A. M.

(Signed) EARL C. BRONAUGH, *Judge.*

21 And afterwards on Monday the 5th day of October, 1908. the same being the 1st Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows, to-wit:

(Title.)

Now at this time comes the State of Oregon, appearing by Dan J. Malarkey, special prosecutor, and the defendant Lem Woon, appearing in person in custody of the sheriff and by Henry E. McGinn of his attorneys, and said defendant having been heretofore duly informed against by the District Attorney, of the County of Multnomah, State of Oregon, on the 1st day of April, 1908, of the crime of murder in the first degree, committed in said County and State on the 7th day of March, 1908, and said defendant having heretofore on the 6th day of April, 1908, been duly arraigned on the charge of murder in the first degree, and thereafter on the

28th day of April, 1908, entered his plea of not guilty of the crime charged in the information, and the defendant Lem Woon having heretofore in said court on the 20th day of June, 1908, being duly convicted of the crime of murder in the first degree, by the verdict of the jury duly impanelled to try said cause, as appears of record herein, and defendant's motion for a new trial and motion in arrest of judgment having been heretofore denied by the court, and this being the time appointed by the court for pronouncing judgment, and no good cause appearing why judgment should not now be pronounced.

It is therefore considered and ordered by the court that the defendant Lem Woon, be confined in the county jail of the county of Multnomah, State of Oregon, and that the Sheriff of the County and State aforesaid within twenty (20) days from the date hereof, deliver said defendant Lem Woon to the superintendent of the Oregon state pentitentiary, and that said defendant be confined within the walls of said penitentiary until the 20th day of November, 1908, and that on said date the defendant Lem Woon thence be taken by the Superintendent of said penitentiary or his warden and in the manner provided by law cause the defendant
22 Lem Woon to be hanged by the neck until he is dead.

(Signed) EARL C. BRONAUGH, *Judge.*

23 And afterwards on Monday the 5th day of October, A. D. 1908, the same beng the 1st Judicial day of said term of said Court, there was rendered and filed in this Court, an order in words and figures as follows, to-wit:

(Title.)

Now at this time on motion of Henry E. McGinn, of Attorneys for defendant, it is ordered that said defendant have 20 days in which to prepare and tender his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

24 And afterwards on Friday the 23rd day of October, A. D. 1908, the same being the 17th Judicial day of said term of said Court, there was rendered and entered in said court, an order in words and figures as follows, to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of Frank F. Freeman, one of defendant Lem Woon's attorneys for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

Oct. 23, 1908.

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25 And afterwards — the 24th day of October, 1908, there was filed in said office a certificate of probable cause in words and figures as follows, to-wit:

(Title.)

I, Earl C. Bronaugh, one of the Circuit Judges of the State of Oregon, for the County of Multnomah, and the judge before whom the above entitled cause was tried, hereby certifies that in his opinion there probably is cause for the appeal which has been taken by the defendant Lem Loon to the Supreme Court of the State of Oregon.

EARL C. BRONAUGH.

Dated Oct. 24, 1908.

26 And afterwards, on the 24th day of October, 1908, there was filed in said office a notice of appeal in words and figures as follows, to-wit:

In the Circuit Court of the State of Oregon for Multnomah County.

STATE OF OREGON, Plaintiff,
vs.
LEM WOON, Defendant.

To the State of Oregon, the above named plaintiff, and to George J. Cameron, District Attorney of the State of Oregon for the 4th Judicial District, and to Frank F. Fields, County Clerk of the County of Multnomah, in the State of Oregon:

You and each of you will please take notice that the defendant Lem Woon hereby appeals from the judgment made and entered herein to the Supreme Court of the State of Oregon which said judgment was rendered in the above entitled court and cause on the 5th day of October, 1908, and which judgment reads as follows; to-wit:

It is therefore ordered and considered by the Court that the defendant Lem Woon be confined in the County Jail of the County of Multnomah and State of Oregon, and that the Sheriff of the County and State aforesaid within twenty days from the date hereof deliver said defendant Lem Woon to the Superintendent of the Oregon State Penitentiary, and that said defendant be confined within the walls of said penitentiary until the 20th day of November, 1908, and that on said date the defendant Lem Woon thence be taken by the superintendent of the State Penitentiary or his warden and in the manner provided by law cause the defendant Lem Woon to
27 be hanged by the neck until he is dead.

FRANK FREEMAN,
HENRY E. McGINN,
R. E. MOODY,
JOHN F. LOGAN,
Atto'ys for Def.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within notice of appeal is hereby accepted in Multnomah County on this 24 day of Oct. 1908 by receiving a copy thereof, duly certified to as such by —— —— Attorney for —— ——.

F. S. FIELDS, *County Clerk,*
By H. C. SMITH, *Deputy.*
GEO. J. CAMERON,
District Attorney,
By J. J. FITZGERALD, *Deputy.*

28 And afterwards, on Thursday the 5th day of Nov. A. D. 1908 the same being the 3rd Judicial day of said term of said court, there was rendered and entered in said court an order in words and figures as follows to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of John F. Logan, of Attorneys for defendant Lem Woon, for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions herein.

(Signed) EARL C. BRONAUGH, *Judge.*

29 And afterwards, on Saturday the 14th day of November, A. D. 1908 the same being the 11th Judicial day of said term of said court, there was rendered and entered in said court, an order in words and figures as follows to-wit:

(Title.)

Now at this time this cause coming on to be heard upon motion of John F. Logan, one of defendant Lem Woon's attorneys, for additional time within which to prepare and file his bill of exceptions herein.

It is ordered that the said defendant Lem Woon be and he is hereby granted ten days additional and further time to that heretofore granted within which to prepare and file his bill of exceptions, herein.

(Signed) EARL C. BRONAUGH, *Judge.*

30 Be it remembered, That at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Court House in the City of Portland, in said County and State on Monday, the 1st day of November, A. D. 1909, the same being the First Monday in said month, and the time fixed by law for holding a regular term of said Court.

Present, Hons. Earl C. Bronaugh, Robert G. Morrow, John B. Cleland, C. U. Gantenbein and William N. Gatens, Judges.

Whereupon, on this Saturday the 20th day of November, A. D. 1909, the same being the Eighteenth Judicial day of said term of said Court, among other proceedings the following was had, to-wit:

C. 764.

STATE OF OREGON, Plaintiff,
vs.
LEM WOON, Defendant.

Based upon the stipulation filed herein, it is now ordered that the Clerk of this Court shall attach the original bill of exceptions herein to the transcript on appeal to the Supreme Court, in lieu of a certified copy thereof.

(Signed) EARL C. BRONAUGH, *Judge.*

31 In the Circuit Court of the State of Oregon for the County of Multnomah.

STATE OF OREGON,
County of Multnomah, ss:

I, F. S. Fields, County Clerk and Ex-Officio Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries constituting the Judgment Roll, together with the Notice of Appeal in case of State of Oregon, Plaintiff and Respondent, vs. Lem Woon, Defendant and Appellant have been by me compared with the originals thereof, and that they are true and correct transcripts of such original Pleadings, Papers, Orders, Journal Entries and Notice of Appeal as the same appear of record and on file at my office and in my custody, and that the accompanying Bill of Exceptions is the original thereof as filed by me in said case.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court the 20th day of November, 1909.

F. S. FIELDS, *Clerk,*
[SEAL.] By H. C. SMITH, *Deputy.*

32 No. —. In the Supreme Court of the State of Oregon. Appeal from Multnomah County. State of Oregon, Plaintiff and Respondent, vs. Lem Woon, Defendant and Appellant. Transcript. Filed Nov. 22nd, 1909. J. C. Moreland, Clerk.

33 In the Municipal Court for the City of Portland, County of Multnomah, State of Oregon.

STATE OF OREGON
vs.
LUM SUE, alias LEM WOON, & YEE GON, Defendants.

Information on Felony.

STATE OF OREGON,
County of Multnomah, ss:

Be It Remembered that on this day there personally appeared before me Municipal Judge of the City of Portland a committing Magistrate, who being first duly sworn as a witness concerning the fact, upon his oath deposed and said that the crime of murder in the first degree has been committed by —— as follows, to-wit:

The said Lum Sue, alias Lem Woon, & Yee Gon, on the 7 day of March, A. D. 1908 in the City of Portland, County of Multnomah, State of Oregon, then and there being did then and there unlawfully and feloniously purposely and of their deliberate and premeditated malice, kill and murder one Lee Tai Huey, by then and there shooting him, the said Lee Tai Huey, with certain revolvers which were then and there loaded with gun powder and leaden bullets, then and thereby inflicting upon the body of him, the said Lee Tai Huey, certain mortal wounds of which said mortal wounds, he, the said Lee Tai Huey, then and there died, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated this 9th day of March, A. D. 1908.

CHIN JOHN, *Informant.*

Subscribed and sworn to before me this 9 day of March, A. D. 1908.

GEO. J. CAMERON,
Municipal Judge of the City of Portland and ex-Officio Justice of the Peace.

I move the Court on the within information, that a warrant issue for the apprehension of the said Lun Sue, alias Lem Woon,
34 & Yee Gon.

JOHN MANNING,
District Attorney,
By JOHN H. STEVENSON, *Deputy.*

GEO. J. CAMERON,
Municipal Judge.

"Endorsed:" Filed this 9th day of March, A. D. 1908. Geo. J. Cameron, Municipal Judge of the City of Portland, and Ex-Officio Justice of the Peace.

35 In the Municipal Court for the City of Portland, County of Multnomah, State of Oregon.

STATE OF OREGON
vs.
LEM WOON, YEE GUENG.

On this 14th day of March A. D. 1908, the above named defendant having been brought before me, a Municipal Judge and Ex-Officio Justice of the Peace for the City of Portland, in the County and State aforesaid in a criminal action for the crime of Murder 1st Degree, the said Lem Woon, Yee Gueng having waived the right of examination I order him to be held to answer the same, he be committed to the County Jail, there to await the action of the Grand Jury committment issued and delivered to the Sheriff of Multnomah County, State of Oregon.

GEO. J. CAMERON,
Municipal Judge and ex-Officio Justice of the Peace for the City of Portland.

STATE OF OREGON,
County of Multnomah,
City of Portland, ss:

I, F. D. Hennessy hereby certify that I am the duly appointed, qualified and acting Clerk of the Municipal Court for the City of Portland, Multnomah County State of Oregon. That the foregoing copy of Order of Transcript has been compared by me with the original, and that it is a true, full and complete copy of the original of said Order of Transcript and of the whole thereof, which original is of record in said court and is in my care and custody.

Dated this 14th day of March, 1908.

36 F. D. HENNESSY,
Clerk of the Municipal Court for the City of Portland, Multnomah County, State of Oregon.

"Endorsed:" Filed this 14th day of March, 1908. F. S. Fields, Clerk Circuit Court, By H. C. Smith, Deputy.

No. 3878.

STATE OF OREGON,
County of Multnomah, ss:

I, F. S. Fields, County Clerk of the above named County and State, and ex-officio Clerk of the Circuit Court of the County of Multnomah, State of Oregon, do hereby certify that the foregoing copy of Information and Order has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original Information and Order as the same ap-

pears in Transcript of Order Municipal Court, on file in my office and in my care and custody.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, this 21st day of Mar. A. D. 1911.

[SEAL.] F. S. FIELDS, *Clerk*,
H. C. SMITH, *Deputy*.

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37 In the Supreme Court of the State of Oregon, March Term, 1909.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

Continuation of Appellant's Brief.

Appeal from the Circuit Court of the State of Oregon for Multnomah County.

Hon. Earl C. Bronaugh, Judge.

Mr. George J. Cameron, District Attorney,
Mr. Joseph J. Fitzgerald, Deputy District Attorney, and
Mr. Dan J. Malarkey,
Attorneys for Plaintiff-Respondent.
Mr. John A. Logan,
Mr. Frank F. Freeman,
Mr. Ralph E. Moody and
Mr. Henry E. McGinn,
Attorneys for Defendant-Appellant.

(Endorsed): "Filed Dec. 23, 1909. J. C. Moreland, Clerk of the Supreme Court."

38 In the Supreme Court of the State of Oregon, March Term, 1909.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

Continuation of Appellant's Brief.

Appeal from the Circuit Court of the State of Oregon for Multnomah County.

Hon. Earl C. Bronaugh, Judge.

Assignment of Error XIII.

The court had no jurisdiction over the defendant, or over the subject-matter of the crime attempted to be charged.

The information charging the defendant with the crime of murder was filed by the District Attorney, under the provisions
39 of an act of the legislature approved February 17, 1899, Session Laws of 1899, page 99. This act is unconstitutional and void, violating Section 18 of Article 8, of the Constitution of Oregon, the 5th and Section 1 of the 14th amendment to the Constitution of the United States.

Assignment of Error XIV.

The information filed in this case is void and confers upon the court no jurisdiction over the defendant, or of the subject-matter.

The information in this case was neither verified nor under oath or affirmation and the defendant never had a preliminary hearing and the information is, therefore, void and contrary to Section 9, Article 1, of the Bill of Rights of the Constitution of Oregon, and the 5th and Section 1 of the 14th amendment of the United States Constitution.

In re Lowrie, 8 Colo. 508-11, 9 Pac. 489.
U. S. v. Tureaud, 20 Fed. 621.
Myers v. People, 67 Ill. 503.
State v. Gleason, 32 Kan. 245, 4 Pac. 363.
Salter v. State (Oklahoma), 102 Pac. 719.

Assignment of Error XV.

The court had no jurisdiction to pronounce judgment against the defendant and the court erred in pronouncing judgment and
40 sentence against the defendant, over the objection of the defendant, and the defendant should be discharged.

At the time that the appellant was charged with the offense involved in this case, the act of the legislature authorizing criminal prosecutions on the information of the District Attorney was in force, but prior to the sentence and entry of judgment against the defendant, the Constitution of the State of Oregon had been amended, which amendment is now in full force and effect, and was prior to the time that the defendant was sentenced, and judgment entered against him, which amendment provided that no person shall be charged in any circuit court with the commission of any crime or misdemeanor, except by an indictment found by a grand jury.

Amendment to Section 18 of Article 7 of the Constitution of Oregon.

This amendment contained no saving clause, and the amendment, therefore, operated to repeal all of the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment, and all power derived from the statute authorizing the filing of criminal information ceased on the adoption of such Constitutional Amendment, and could not be further pur-
41 sued, the court would, thereafter have no jurisdiction or power to proceed further and all persons accused of a criminal

offense before final action by the appellate court had been had in such trial, should be discharged, and especially is this true, where judgment and sentence had not been imposed upon the accused. The court has no power or jurisdiction to proceed further in the matter, or to do any other thing than to dismiss, for want of jurisdiction, such criminal cases pending, in such circumstances, to hold the defendant; would deprive him of his liberty without due process of law, and contrary to the 5th amendment of the Constitution of the United States, and to Section 1 of the 14th amendment of the Constitution of the United States, and to Section 18 of Article 7, as amended, of the Constitution of the State of Oregon, and to Section 9, Article 1, of the Constitution of the State of Oregon.

State v. Andrews, 20 Texas, 230.
State v. Ingersoll, 17 Wis. 651.
Assessors v. Osborn, 9 Wallace, 507.
Hirschberg v. People, 6 Colo. 145.
U. S. v. Kelly, 97 Fed. 460.
Springfield v. Hamden, 6 Pick. (Mass.) 501.
Lewis Sutherland's Statutory Construction, Vol. 1, p. 554, Section 286.
Keller v. State, 12 Md. 322.
Ex parte Wilson, 114 U. S. 417.
42 Mackin v. U. S., 117 U. S. 348.
Barkinson v. U. S., 121 U. S. 281.
Ex parte McClusky, 40 Fed. 71.
Ex parte Brown, 40 Fed. 81.
U. S. v. Smith, 40 Fed. 755.
Finley v. State, 61 Ala. 201-5.
22 Cyc. 171.
Aylesworth v. State, 65 Ill. 301.
Laura v. State, 26 Miss. 124.
Ex parte Ogle, 61 S. W. 122.
French v. State, 53 Miss. 651.
Ex parte McArdle, 7 Wallace, 506.
Taylor v. State, 7 Blackf. 93.
People v. Tisdale, 57 Calif. 104.
Whitehurst v. State, 43 Ind. 473.
State v. O'Connor, 13 La. (Ann.) 486.
Commonwealth v. Pattee, 12 Cush. 501.
State v. Henderson, 13 La. (Ann.) 489.
Lunning v. State, 9 Ind. 309.
Mullinix v. State, 43 Ind. 511.
Wharton v. State, 94 American Decisions, 214, Note on page 217.

Respectfully submitted,

JOHN F. LOGAN,
FRANK F. FREEMAN,
HENRY E. McGINN AND
RALPH E. MOODY,
Attorneys for Lem Woon.

43 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from the Circuit Court for Multnomah County.

The Honorable Earl C. Bronaugh, Judge.

Argued and submitted March 3, 1910.
Mr. Joseph J. Fitzgerald and Mr. Dan J. Malarkey, for Respondent.
Mr. John F. Logan, Mr. Frank F. Freeman, Mr. Ralph Moody and Henry E. McGinn, for Appellant.

EAKIN, *J.*:

Affirmed.

Filed Apr. 5, 1910. J. C. Moreland, Clerk of the Supreme Court.

44 On April 1, 1908, defendant, jointly with Yee Gueng, was charged by information with the crime of murder by killing Lee Tai Hoy on March 7, 1908, and upon a separate trial was found guilty of murder in the first degree, and apepals from a judgment therein. The homicide was committed in a building at the corner of Fourth and Pine Streets, in Portland, Or. This defendant, Yee Gueng, and Jo Ah Bong, lived in two rooms on the third floor of a building at the corner of Second and Oak Streets, on the east side of Oak, being one block south and two blocks east of the place of the homicide. Defendant denied that he did the killing, and attempted to prove alibi. He also contends that his name is Lum Suey, and not Lem Woon.

John F. Logan, Frank F. Freeman, Ralph E. Moody, and Henry E. McGinn, for appellant. Joseph J. Fitzgerald and Dan J. Malarkey, for the State.

EAKIN, *J.* (after stating the facts as above):

Many of the assignments of error arise out of the fact that there is evidence tending to show that decedent, the two defendants, and most of the witnesses are Chinese, and are members of a Chinese society known as the "Bow On Tong"; that before the killing there was trouble in the Tong, which had divided it into two factions; and that decedent was blamed for this trouble. Most of the Chinese witnesses for the state and the decedent belonged to what is referred to as the new faction, and most of those for the defense belonged to the old faction, and there was evidence tending to show that the killing was the result of the trouble between the factions. The trial

was conducted principally by D. J. Malarkey, who appeared with the district attorney for the state.

The first assignment of error relates to the conduct of Mr. Malarkey in the cross-examination of Chin Lum, a witness for defendant, who belonged to the old faction of the Tong, lived in the same rooms with defendant, and testified for defendant upon his defense of an alibi. After some cross-examination as to what took place at those rooms, Mr. Malarkey asked: "Isn't it a fact that is a place where you keep a lot of knives and pistols and guns to kill people with?" This was objected to, and the objection sustained. The question was repeated in a different form, and an objection again sustained, and a third time it was asked in another form, and objected to. The objection was at first overruled, and the witness answered: "That place belong Bow On Tong, formerly Bow On Tong headquarters. Good many members come there to stay, and leave their things there. Don't know who belonged, because former time Bow On Tong been there." It appears that a box containing the weapons referred to in the question were on the clerk's desk, and were about to be presented by counsel, when the court adjourned until morning and reserved final decision for further consideration. On reconvening court, the judge announced that he was not clear as to the admissibility of this evidence, and that the defendant should have the benefit of the doubt, and excluded the evidence. Thereupon, at the request of Mr. Malarkey, the jury retired, and in their absence there was further controversy in relation to the question, and the weapons were offered in evidence, but not in the presence of the jury, when the court said: "The introduction of the weapons under such circumstances might tend to prejudice the case of this defendant in the minds of the jury. Call the jury." It is not necessary for us to determine the relevancy of the matter sought to be adduced by the question and offer, as the objections were sustained. But the inquiry is whether asking the question, the presence of the box of weapons, and the statement were prejudicial and reversible error, without other ruling by the court or exception by defendant. The first reference to the trouble in the Bow On Tong was by the defense in the cross-examination of the state's witnesses Lee Shu and Gow Ying Yuen. It was also mentioned by decedent in his dying declaration as testified to by Lee Hueng and R. W. Wilbur, and also by defendant in his direct examination, and this question was asked evidently on the theory that the trouble resulting in the shooting was a Tong fight, and we see nothing in the facts or conduct of counsel to indicate that the question was asked in bad faith or from an improper motive. The mere asking of the question was not reversible error. In this connection may be considered assignment of error No. 6, relating to the conduct of Mr. Malarkey in asking defendant's witness Sam Ah Pye, "You and Won Jake Num have fixed up a good many Chinese jobs, haven't you?" which, upon objection, was withdrawn, and no ruling was asked or exception taken, and therefore no error was committed, although the asking of such a question should not be countenanced.

The second assignment of error relates to the scope of the cross-examination of Jo Bong, a witness for defendant, and the statements of Mr. Malarkey in relation thereto. His direct examination related only to what took place in his hearing at the hospital. Defendant's counsel had previously brought out in cross-examination of the state's witnesses and by defendant himself the facts disclosed as to the Bow On Tong, the division in it, and that the Chinese witnesses belonged to one faction or the other. It was evidently the purpose of the defendant to impress upon the jury that the killing of Lee Tai Hoy was the result of a feud in the Tong, one faction against the other, rather than a personal difficulty between the slayer and Lee Tai Hoy. This purpose is also disclosed by the effort of defendant to introduce the evidence of Mr. Lord and Sam Ah Pye as to the custom of the Chinese to seek revenge in such cases against any one in the opposing faction. Jo Ah Bong, as had already been shown by the state's evidence, was present when defendant and Yee Gueng were arrested in their rooms at the corner of Second and Oak streets, having the door to the rooms locked and barred, and refused to admit the officers, and, when they forced the door, they found Jo Bong and defendant Yee Gueng in the toilet and this defendant in the other room. And, after arresting Jo Bong and Yee Gueng, they discovered on the floor of the toilet a 41 colt's revolver loaded. Upon the cross-examination of Jo Bong, Mr. Malarkey asked: "Why didn't you open the door when the officers knocked?" Counsel for defendant objected to this question on the ground that it was incompetent and not cross-examination, whereupon Malarkey remarked: "Are you objecting to having this man who was down there tell what happened there? Can't I show that you tried to seal this man's lips who was there; that he was standing on guard at the door with a gun, preventing the police getting them; * * * and I have a right to show the interest of this witness in this case and show that this witness whom you put upon the witness stand, and whom you fail to ask about what occurred at the time and place where he was present —. I have a right to develop upon his cross-examination his interest in this defendant," etc. Defendant's counsel moved that "these remarks be stricken out with reference to murderers and everything else in this case, and the remarks about the man standing on guard at the door with a pistol." The reference to "murderers and standing guard with a loaded revolver" was stricken out. The question objected to was proper cross-examination, as tending to show the interest of the witness, and the aid he was rendering defendant and the objectionable parts of Malarkey's remarks were stricken out. We find no prejudicial error in this assignment. Thereafter the witness was cross-examined at length as to his conduct from the time he ate supper until the time of the arrest, about 8 o'clock, all of which was objected to as not cross-examination, and exceptions were saved. This examination tended to show his interest and may have had a bearing upon his credibility, and was within the state's privilege of cross-examination. It is said in State v. Mah Jim, 13 Or. 235, 10 Pac. 306, that "in a

criminal case any question which tends to show a feeling or bias of the witness against the accused is competent." In State v. Olds, 18 Or. 440, 442, 22 Pac. 940, 941, it is said: "The state had the right, on cross-examination, to ask the witness anything that would show his interest in the result of the trial, and anything he did in aid of the defendant about the trial for the purpose of enabling the jury to properly weigh his evidence, and to intelligently pass upon his credibility." By section 695, B. & C. Comp., the presumption that a witness speaks the truth may be overcome by evidence affecting his motives. Section 716 provides that it is "within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

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At the close of the testimony of Tichenor, the pistol, which was found on the toilet floor, was admitted in evidence over defendant's objection, and this is assigned as error. The pistol does not appear to have been offered as in any way connected with the shooting of Lee Tai Hoy, but as incident to and connected with what transpired at the time the door was forced and the defendants and Jo Bong arrested, and we find no error in admitting it. Also, this evidence and that relating to the Bow On Tong, the trouble in it, the fact that defendants and decedent, as well as the witnesses, were members of it, justify the instruction defining and limiting the purpose and effect of the evidence relating to the Bow On Tong, and was not an invasion of the province of the jury. Exceptions were also taken to questions asked defendant upon his cross-examination.

For the purpose of establishing an alibi, defendant on his own behalf testified that from 10 minutes past 6 o'clock p. m. on the day of the homicide he was not out of his rooms on Second and Oak streets until he was arrested about 8 o'clock p. m. He also testified at length as to what took place at the hospital when he was taken there by the officers immediately after the arrest for identification by the wounded man. The cross-examination related among other things to whether or not Jo Bong, whom he named as one who had eaten supper there, had gone out of the rooms during the time referred to and how long he had been gone; also, as to his acquaintance with, and his identification of, Lee Tai Hoy and Lee Hueng, who were at the hospital, and as to whose statements he had testified on direct examination. To all of this cross-examination defendant objected on the ground that it was not cross-examination and made defendant a witness against himself. The state had a right to examine him as to the circumstances bearing upon the alibi, both as to the fact of his presence in the rooms and anything that might bear upon the truthfulness of his statements in relation thereto, and the same is true as to his acquaintance with decedent and Lee Hueng, so far as it relates to his identification of them; also, in his direct examination, defendant testified that his name was Lum Suey, and not Lem Woon, and the same objection was made to the inquiry by the state as to his statement made upon his arraignment, that his name was correctly stated in the information and as to the proceedings at the preliminary examination where he was referred to only as Lem Woon.

We think this was all strictly within the state's right of cross-examination. It was germane to statements made in his direct examination upon these matters. Section 1400, B. & C. Comp., makes a defendant in a criminal action competent as a witness on his own behalf, and, when offering himself as a witness, he shall be deemed to have given the prosecution a right to cross-examination upon all facts to which he has testified tending to his conviction or acquittal. The scope of such cross-examination is now settled by the case of State v. Bartmess, 33 Or. 110, 124, 54 Pac. 167, 171, where Mr. Justice Moore, speaking for the court says: "A fair construction of the statute in question leads us to conclude that defendant in a criminal action, having voluntarily testified in his own behalf, may be cross-examined in relation to all facts and matters germane to the testimony given by him on his examination in chief." And in State v. Miller, 43 Or. 325, 330, 74 Pac. 658, 659, Mr. Justice Wolverton says: "The statute, however, is not to receive an unduly restricted or narrow construction, and the cross-examination must extend the inquiry to facts and matters manifestly germane and relevant to the facts testified to in chief, tending to their explanation and elucidation, and in this respect may be as searching and broad as the foundation upon which it rests." And in the still more recent case of State v. Deal, 52 Or. 568, 98 Pac. 165, Mr. Chief Justice Bean, speaking of the cross-examination of a defendant, says: "It must now be regarded as settled that it must be confined to matters properly germane to and connected with his testimony in chief. * * * In other words, a defendant cannot under the guise of a cross-examination, be compelled, in violation of section 11, art. 1, of the Constitution of Oregon, to give evidence against himself, but, when he becomes a witness on his own behalf, he waives this constitutional guaranty as to all matters properly connected with his examination in chief, and subjects himself to such cross-examination thereon as may tend to explain, elucidate, or affect the credibility of his testimony, and such cross-examination may be as vigorous, and searching as that of any other witness." Thus, even if the cross-examination does make him a witness against himself, it is not objectionable on account thereof, provided it relates to matters properly connected with his examination in chief. No error was committed in permitting this cross-examination.

There was a conflict in the evidence as to what is the true name of defendant, but that was a question for the jury. Furthermore, the defendant was identified by several witnesses independent of the name. Lee Tai Hoy in his dying declaration pointed him out as his assailant; also, Chung Kim and Lee Shu and Gow Ying Yuen identified him as running from the house immediately after
47 the shooting, and it was for the jury to determine the fact.

During the presentation of the state's case, Malarkey called to the witness stand Jung Ah Poo, and, after he was sworn as a witness, Mr. Malarkey stated: "That the testimony, if any, that this witness will give is in my judgment only hearsay testimony, and I only called him because of the fact that counsel for the defense has intimated that they want Jung Poo." Counsel for the defense stated: "We haven't called him, and we never said we wanted him. We

asked one witness where he was, where the man that gave him the information was, and he said he was gone." Mr. Malarkey replied. "No; he said he didn't know. Now, here is Jung Poo. I do not offer him as having any personal knowledge of any facts, but, if you want Jung Poo, I do not want you to object when I call him, because you have practically made so much about Jung Poo I do not want any objection on the ground that it is hearsay evidence." Mr. Logan replied: "I desire that that be stricken out. This man is on trial for his life, and this is not to be the subject of by-play between counsel. I move to have it stricken out. The Court: "I suppose counsel has a right to make his statement when he produces the witness out of the abundance of caution." Prior to this time Lem Ling, a witness for the state, testified that he had called the police and aided in pointing out to them the defendants, and that he had obtained his information as to who had done the shooting from Jung Poo, and, when cross-examined by defendant's counsel in regard to Jung Poo, Mr. Freeman for the defense stated: "These men that incited the arrest appear to have disappeared." Mr. Malarkey: "Jung Ah Poo will be produced here if you want him." Mr. Freeman: "I was taking it from the testimony of the witness that he had disappeared. He didn't seem to know where." Mr. Malarkey: "This witness is not his guardian. We will put him on the witness stand if you want to hear him." Mr. Freeman: "Then we will find out all about this." Thus it seems there was an understanding between counsel that the state was to produce the witness, and it may have been a proper precaution for the state to do so before the close of defendant's testimony. Yet we cannot approve of the state's method of doing this. It should not have sworn him as a witness before the close of its case with no intention of asking him any questions. But no ruling was made by the court or exception taken, and no error was committed.

As to the seventh assignment of error, defendant states: "The defendant will insist that it was error on the part of the court to allow the district attorney, a judicial officer of the court, to turn over the prosecution of this case to a special prosecutor, who was in no manner an officer of the court, but was employed by the friends of Lee Tai Hoy as a special prosecutor." At the commencement of the trial, it is recited in the record that the state was represented by "Mr. John H. Stevenson and J. J. Fitzgerald, deputies to the district attorney of the Fourth judicial district of the state of Oregon, and Mr. Dan J. Malarkey, special counsel for the state." This is the only reference in the record to the matter. His right to appear was not questioned, nor is the character of his employment stated, and the question is raised here for the first time. Therefore it is not before us for decision.

The defendant attempted to show the revengeful disposition of the Chinese people as a race, to the effect that "when a trouble breaks out between two classes, or factions of the same class, and one man is injured, he does not care particularly whether he gets the assailant or the person who particularly injured him, but is satisfied if he brings injury upon one or the other side or class or faction," and for that purpose called two witnesses, Chas. F. Lord, a white man,

and Sam Ah Pye, a Chinese. This was offered, as appears, in connection with and in aid of the other evidence tending to cast doubt upon the identity of the slayer of Lee Tai Hoy; the design thereby being to discredit the state's witnesses. The evidence offered relates to Chinese customs or characteristics, and applies to the race, and not to the individual. But a rule that would admit evidence of such characteristics or customs of a class or a race to affect the credibility of an individual witness of that class or race cannot apply to the Chinese more than to the Negro, Indian, or any other people who practice them. This characteristic of the Chinese, if it does exist among them, is probably outclassed by family or neighborhood feuds existing to this day in certain localities in our own country, where wrongs of generations ago are still being avenged. To admit such evidence would be a dangerous precedent. Testimony should be received only under legal principles and rules of evidence. Section 722, B. & C. Comp., provides that "all persons, without exception (save certain persons who are incompetent) may be witnesses." By section 695: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility." The court must determine the competency of the witness, but the jurors are the exclusive judges of his credibility and the weight to be given to his evidence. All persons who are competent to testify, regardless of age, relation, race, or color, stand equal before the law under the presumption of this statute, Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570. And the circumstances or evidence to affect his credibility must relate to and
48 affect the individual. Anything beyond this would not only be unreliable but dangerous. Wigmore, in his work on Evidence, after discussing at some length testimonial qualifications of witnesses, and comparing the relative credibility of witnesses, and the value of testimony of people of different races and color, says, at section 516: "Taking all these considerations together, it may be concluded that any judgment of condemnation for the testimony of aliens in general, or of particular races or peoples, is likely to be, in the first place, absolutely incorrect as not founded on facts; in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; in the third place, unwise, as tending merely to perpetuate ill-feeling and misunderstanding; and, finally, unsound in principle, as excluding indiscriminately a mass of testimony which ought to be weighed and credited in each individual instance for what it may seem to be worth." It is said in United States v. Lee Huen (D. C.) 118 Fed. 442, and indorsed by Wigmore at section 936, that: "If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony." And the same rule should apply to a bias of the witness in favor of or against a family or faction to which the

wrongdoer belongs, if the latter cannot be reached. But it certainly would be incompetent to show the reputation or trait of character of a class or race of people as to matters that might discredit the race for the purpose of discrediting the testimony of an individual of that race. Each witness should stand or fall by his own character, motives or customs, and not that of his race. In Shelp v. United States, 81 Fed. 694, 698, 26 C. C. A. 570, 574, the same principle was involved and the following instruction to the jury was approved: "(1) It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitledto as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law. (2) In weighing the evidence of witnesses, you have a right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness in giving their testimony, or the want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things, together with all the facts and circumstances surrounding the case, as disclosed by the testimony, determine where the truth of this matter lies." This is in accord with sections 722, 695, B. & C. Comp., above quoted, that provide that "all persons without exception * * * may be witnesses," and "a witness is presumed to speak the truth," and specifying the methods by which a witness may be discredited. The credibility of a Chinese witness must be determined by the rules of law applicable to other witnesses. It is said in Woey Ho v. United States, 109 Fed. 888, 48 C. C. A. 705, in referring to the credibility of witnesses, that "all people, without regard to their race, color, creed or country, * * * stand equal before the law." In McDaniel v. Monroe, 63 S. C. 307, 41 S. E. 456, it is said: "The credibility of a witness is not to be tested by the color of the witness or by the race to which he belongs." And by that test evidence that tends to cast discredit upon the race cannot be received to discredit an individual witness. It is said in Shelp v. United States, supra: "The truth is that, in law, both classes stand upon the same plane. The weight and credibility of every witness is to be determined in the manner set forth in the clause marked '(2)' (of the instruction above quoted), which contains a clear and correct statement as to the duty of jurors in weighing the testimony of the witnesses whether they be white men or Indians." The result of these discussions, upon this subject, is to the effect that matters by which it is sought to discredit a witness must be such as affect the individual witness. He must be heard and recognized in his individual capacity, and not condemned or discredited because of the race to which he belongs or by its customs or reputation. We find no error in excluding the evidence offered.

Defendant also excepted to the court's instruction as to the flight of defendant. There was some evidence tending to show that defendant ran from the place of the shooting immediately after the homicide, and soon thereafter was barricaded in the rooms where

he was found and arrested after the officers had forced the door. The term "fleeing from justice," as used in the United States statutes, is defined in United States v. O'Brian, 27 Fed. Cas. No. 15,908, as "to leave one's home or residence or known place of abode within the district, or to conceal one's self therein with intent in either case to avoid detection or punishment for some public offense against the United States." In the case before us the court left it to the jury to determine whether defendant did flee on account of this homicide, and only charged them as to the effect of such flight, if found by them that he did flee, as bearing upon the probability of his guilt or innocence, and was not an invasion of the province of the jury, and was not error. We find no error in the manner of giving of the instruction asked by Mr. Malarkey, and no objection was taken to the law as stated in the instruction.

49 Assignments of error 13, 14, and 15 relate to the trial of the defendant upon an information which was filed under section 1258, B. & C. Comp. These questions were decided adversely to defendant's contention in State v. Ju Nun, 53 Or. 1, 98 Pac. 513, to which we adhere.

The judgment of the lower court is affirmed.

50 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 7th day of March 1910

Whereupon on this Tuesday the 5th day of April, 1910, the same being the 15th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. Kin, Associate Justice, and
J. C. Moreland, Clerk.

when the following proceedings were had:

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from Multnomah County.

This cause having, on the 3d day of March, 1910, been duly argued and submitted to the court upon and concerning all the questions arising upon the transcript and record, and then reserved for further consideration. And the court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs, finds that there is not error as alleged. It is therefore ordered and adjudged by the court that the judgment of the court below in this cause rendered and entered be and the same is, in all things affirmed.

And it is further ordered that the respondent recover of and from

the appellant its costs and disbursements in this court taxed at $—.

And it is further ordered that this cause be remanded to the court below from which this appeal was taken with directions to enter a judgment in accordance herewith and to take such proceedings as may be proper to carry out the judgment of the court.

51 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff-Respondent,
vs.
LEM WOON, Defendant-Appellant.

The defendant, Lem Woon, respectfully asks the Court that a rehearing be granted him. He feels that in the opinion filed by the Court on the 5th of April last, there are some errors and inaccuracies highly prejudicial to him, which he can establish to the satisfaction of the Court, if he is permitted to re-argue this cause.

I.

In the first place, on page 975 of Volume 107 of the Pacific Reporter, at the bottom of the page is found this expression: "It appears that a box containing the weapons referred to in the question, were on the Clerk's desk and were about to be presented by Counsel, when the Court adjourned until morning and reserved final decision for further consideration." It is to be noted here that this box which was about to be presented, had been during the entire introduction of the State's case, on the clerk's desk and in full view of the jury, though until the Defendant went into his case, there was no effort made by the State to have these weapons formally introduced in testimony.

As it appears in the opinion, the weapons were casually there only for a moment, when, as a matter of fact, they had been present during the entire time that the State was presenting its case; as clearly it appears from the testimony of officer Tichener (See testimony of Tichener, pages 84 and 85 of the Bill of Exceptions—See pages 56 and 57 of Appellant's Brief).

Of course there was no formal objection made to the box of weapons during the time that they were in the Court Room, until Counsel made the formal proposal to introduce them in testimony;
52 doubtless for the reason that Counsel feared to give too much prominence to these weapons. Now the presence of these weapons in the Court Room and in plain sight of the jury, could only excite a feeling of prejudice of the most terrible kind against the Defendant. Counsel had attempted by indirection to do what he would not be directly allowed to do. Courts have always allowed new trial in all such cases. Exceptions can only be taken to direct offers, to things which are directly offered and directly done—They cannot be taken to indirect and underhanded methods of doing things; and what a man cannot directly do, the Courts will not permit him to indirectly attempt to do.

May we ask the Court in this connection to consider what is said in Section 1157 of Wigmore on Evidence—and note what is said by the learned author at the end of Section 1157, of the necessity of proper authentication of weapons before their introduction; and remember that not a weapon in the box, which was in full sight of the jury, was ever connected with the defendant in any way.

II.

The Court has said on page 976 of the 107th Pacific Reporter, in the opinion delivered in this Cause: "Although the asking of such a question should not be countenanced"—Yet the Court has countenanced the asking of the question, and this too in a capital case, which means the taking of the life of a human being by legal proceedings. On this subject may we ask the Court to see what we say under point IV hereafter.

III.

There can be found no authority in any law book which we have ever seen, which will uphold the Court's ruling for the introduction of the pistol which was found on the toilet floor at the lodging house where the defendant lived. The Court says, in its opinion: "The pistol does not appear to have been offered as in any way connected with the shooting of Lee Hoy." If it were not connected with the shooting of Lee Tai Hoy, its introduction in the testimony was clearly immaterial and prejudicial to the Defendant in the highest degree. This alone should grant the defendant a rehearing in this cause. The pistol was never used by the defendant, was never in his possession, or in any manner connected with him or with the crime.

53 Will the Court please consider the cases which are found in the 12th Cyc. 394 under caption "F"—Instruments or weapons connected with offense—And will the Court please read Wigmore on Evidence, Vol. II. 1157. This exact point was ruled in our favor in State v. Kehr, 133 Iowa, 35, 37; point (2).

IV.

We now come to the point, urged by the Appellant, in relation to Jung Ah Poo. The Court has said, in the opinion found in the Pacific Reporter, Vol. 107, page 978, when speaking of this Jung Poo incident: "Yet we cannot approve of the State's method of doing this. It should not have sworn him as a witness before the close of its case, with no intention of asking him any question; but no ruling was made by the Court or exception taken, and no error was committed." Yet the Court admits that a great wrong was done this Defendant—A wrong against a legal right of his, highly prejudicial to him. Counsel had done by indirection again what he could not have directly done, nor what he would not have attempted to do directly.

There is no ruling the Trial Court could have made under the circumstances, that would have cured the error or removed the preju-

dice which thus was intended to be created and was created in the minds of the jurors.

No exception is necessary. May we be pardoned for calling to the Court's attention again what was said by that able Judge, De Haven, in the case of People vs. Ah Len, 92 Cal., 282, 285.

"It follows that the only safe and just rule in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby. It may be added that if the fact stated by counsel had been introduced in evidence, against the objections of appellants, it would have been sufficient to reverse the judgment, as the fact is itself an irrelevant one. It had no legitimate tendency to prove any issue in this case, but it was one which, as urged by counsel for the prosecution, was well calculated to illustrate the violence of appellants, and this was doubtless the object of bringing it to the attention of the
54 jury, but the character of a Defendant on trial for murder is not subject to this kind of attack."

And again at page 284 the same able Judge says:

"It is true that the attorney for the prosecution in this case was not permitted by the court to comment at any length upon the facts which he himself imported into the case; but while this was to the credit of the court, it does not change the fact that a matter not in evidence and of a nature clearly prejudicial to the appellants, was laid before the jury for the purpose of affecting their verdict, and it is no answer to this to say that the jury may have disregarded it."

Nor can an exception be taken where the objection has been sustained by the Court; but where the result of any conduct is to prejudice a defendant in his legal rights, the Courts grant new trials wherever they think prejudice was created, though Counsel for the State was not permitted to do what he intended to do. See further upon this point what is said by Prof. Wigmore in his work on Evidence, Vol. III, Sec. 1808, Subdivision II.

V.

The Court in the opinion filed did not pass upon the assignment of Error X—This assignment of error is set forth by us on page 218 of the Appellant's brief, and is not waived, but is still strongly urged by us.

We submit that in a case involving a man's life, where upon his trial, substantial legal rights have admittedly been transgressed; where every manner of indirection was resorted to, to obtain a verdict, and this conduct too condemned by the Court, that it would be improper that a life should be forfeited simply because an omission is made of some rule of procedure which should have been followed.

As we said in presenting this case before, this Court has always said that procedure must give way to substance when legal rights of this kind have been violated.

Will the Court please read, before passing judgment finally upon this case, State vs. Wilcox 131 N. C., 707; and Collier vs. State 115 Ga. 803.

May we in conclusion, say with Mr. Justice De Haven, in the case from which we have already quoted: "that the only safe and
55 just rule in such cases, is to make it impossible for a party to derive any advantage from such misconduct of Counsel, by promptly granting a new trial to the adverse party, unless it was clear that the verdict was not affected thereby."

This Defendant believing that, from the admissions made by this Court in its opinion, as well as from the numerous other errors found in this record, *that* he has not had that fair and imparital trial which the law contemplates he shall have, respectfully requests your Honors to permit him to present his case to the Court once more.

JOHN A. LOGAN,
FRANK F. FREEMAN,
RALPH E. MOODY, AND
HENRY E. McGINN,
Attorneys for the Defendant, Lem Woon.

PORTLAND, OREGON, *June* 29, 1910.

Service accepted and copy received.

GEORGE J. CAMERON,
DAN J. MALARKEY,
J. J. FITZGERALD,
Attorneys for Respondent.

56 Endorsement: Case No. 7173. Drawer No. 716. In the Supreme Court of the State of Oregon. State of Oregon, Plaintiff, Respondent, vs. Lem Woon, Defendant, Appellant. Lem Woon's Petition for a Re-Hearing. Filed June 20, 1910. J. C. Moreland, Clerk of the Supreme Court.

57 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from the Circuit Court for Multnomah County.

The Honorable Earl C. Bronaugh, Judge.

On Petition for Rehearing.

Affirmed April 15, 1910. 107 Pac. 974.

Joseph F. Fitzgerald and Dan J. Malarkey, for respondent.
John F. Logan, Frank F. Freeman, Ralph E. Moody and Henry E. McGinn for appellant.

McBride, J.
Denied.
King, J., and Slater, J., Dissent.

Filed Dec. 31, 1910. J. C. Moreland, Clerk of the Supreme Court.

58 McBRIDE, *J.*:

All the questions raised on this motion are fully discussed by Mr. Justice Eakin in the original opinion in this case, which is reported in 107 Pac. 974, and we shall adhere to the views therein expressed.

Upon this motion counsel, however, lay particular stress upon the action of the court in admitting in evidence the pistol found by officer Tichenor in the toilet at the time he arrested Yee Gueng and Jo Bong. Independent of the fact adverted to in the original opinion that the finding of the pistol was an incident of the arrest and, therefore, admissible, we are of the opinion that, upon well known principles of law, it was admissible on other grounds. The evidence of Lee Shu was direct and positive that he saw this defendant and Yee Gueng and another unknown Chinaman in the hall of the building of deceased, assaulting him, and that they each had pistols. Immediately after this Gow Ying Yuen saw three Chinamen run out of the building and recognized defendant and Yee Gueng as two of them. They were last seen by him going down Oak Street in the direction of the building in which they were afterwards arrested, and only a short distance therefrom. In about half an hour the officers arrived at the room where defendants were arrested and were refused admission. When they finally succeeded in breaking down the door they found Yee Gueng and Jo Bong concealed in a dark closet; a loaded pistol, which gave evidence of having been recently discharged, lying on the floor of the closet; and Lem Woon in a bunk in the adjoining room.

Here is evidence tending to show three things: (1) That defendant was present at the scene of the shooting, in company with Yee Gueng, and that they and another Chinaman were engaged in a felon-ous assault, with fire arms, on deceased. (2) That they fled together to the same building. (3) That a pistol which to all appearances had been recently discharged and reloaded was in the same closet where Yee Gueng had been concealed, under circumstances which indicated to any reasonable mind that it was one of the pistols used by the conspirators in perpetrating the mur-
59 der. Now it makes no difference which one of the three conspirators fired the fatal shot, if the evidence shows that all three were present, aiding and abetting therein. There is strong evidence tending to show that at least three or four bullets were shot from the pistol of Lem Woon, but several bullets are not accounted for, and not found, and the evidence of Tichenor is to the effect that the pistol, found by him in the closet when he arrested Yee Gueng, showed powder stains in the barrel, indicating its recent use.

These circumstances show a criminal conspiracy between Yee Gueng, Lem Woon and another Chinaman to murder the deceased. Nor does the admission of the pistol in evidence come within the rule that under most circumstances forbids the introduction of testimony as to acts or declarations of a conspirator after the termination of the conspiracy. The finding of the pistol and its condition was neither an act nor a declaration; it was a fact indicating that when Yee Gueng was seen with defendant, armed and assaulting

the deceased, he was doing so with intent to murder, and assisted in its perpetration; and this intent and the consequences of it are imputable to the defendant, who, as other evidence tends to show, was present, assisting in the commission of the crime. The pistol was no more an act or declaration of Yee Gueng than was the closet in which he was arrested. It was a mute but forceful witness, corroborating the testimony of Lee Shu, that the defendant and Yee Gueng were armed at the scene of the shooting. It further tended to show that the purpose of their being there was homicidal, and, in some degree, that it had been used for the purposes of the murder.

It is significant that the defendant and Yee Gueng were never so far as the testimony discloses, twenty feet apart from the time the homicide was committed until they were arrested. They were seen together armed at the scene of the shooting; they were seen running away together from the scene of the crime; and they were arrested in the same building, a very short time afterwards, in rooms in close proximity to each other.

60 In a somewhat extended experience in criminal trials the writer has never seen a case of murder in the first degree more clearly and conclusively proved, and to seek now some mere pretext to set aside a verdict obtained after a fair and impartial trial would be to encourage crime and make a mockery of the law.

The petition is denied.

61 KING, *J.* (Dissenting):

At the time of the filing of the former opinion I acceded with some hesitation to the conclusion there announced, but after a careful re-examination into the errors assigned, and the law and evidence applicable thereto, I am unable to concur in the conclusion reached by the majority.

It will be remembered that Lem Woon, at the time of his arrest, while in what is termed the same apartments as those occupied by his co-defendant, was not one of the two Chinamen found hiding in the toilet where the pistol was discovered; the accused, when arrested, being in an adjacent room, and there is no testimony tending to show that the 41 Colt's revolver, offered in evidence, was at any time in his possession or under his control; nor does it appear that Lem Woon was in hiding or attempting to escape detention, further than that he was in a room adjoining the one occupied by his co-defendant, and that the entrance to the entire apartments was barred; these rooms being the regular abode of the defendant and nine or ten others of his race. The revolver was admitted in evidence against him, over the timely and proper objections of his counsel. It is well settled that subsequent declarations and acts, unless shown to be intimately and closely connected with the transaction, are not admissible against one accused of a crime. State v. Smith, 43 Or., 109; State v. Ching Ling, 16 Or., 419. The weapon was found in the place where Yee Gueng and Jo Bong were hiding, under such circumstances, and in such close proximity to them as

to indicate its contemplated use by them in resisting arrest, if necessary, thus indicating to some extent at least that they were attempting to escape, from which guilt might be inferable, and so justify the revolver's admission in evidence against them, as held by us in State v. Yee Gueng, decided at this time. But, so far as serving to connect this defendant with the crime, the same rule does not apply. If admissible at all it is only on the theory that it was a circumstance incident to the arrest, tending to show an effort to escape or in some manner to elude the officers. This assumption cannot be held, for the weapon was not in Lem Woon's possession, and the fact that it was found in an adjacent toilet, occupied by others, is too remote. In this connection, it must be remembered, there were nine other regular occupants of the apartments at the time, that is the quarters occupied by them was a Chinese lodging house. The mere fact that the Chinese society had formerly met there at various times was insufficient to justify the admission in evidence of the pistol in question against any or all persons
62 happening to be either a member of such society, or found to be rooming in the quarters, without in some manner connecting them also with the weapon offered in evidence. This revolver was in the same position, with reference to its admissibility, as was the box of firearms found, the admission in evidence of which the court refused.

To admit the weapon, under the proof accompanying it, is to rely on an inference from an inference, and not a deduction from an established fact, and this character of evidence is expressly excluded by §785, B. & C. Comp., which provides that the inference must be founded:

"1. On a fact legally proved; and

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It will thus be seen that an inference could only be founded on a fact legally proved. No fact is here proved from which it may be inferred that this defendant owned the weapon in question, or in any manner possessed or inten-ed to use it in resisting arrest. The circumstance of the door being locked indicates to some extent that he was evading the officers, and, affording equal protection to all the occupants against arrest, might, if offered, have entitled the lock to admission in evidence; for that fact, once established, its purpose made inference as much against one occupant as another; the weight to be given thereto depending largely upon the conduct thereof after the door was forced open. This feature, however, was proved, and from it the jury might have inferred all were advoiding arrest, but these inferences were from established facts, and not inconsistent with the usual propensities or passions of men, mentioned in the above section of the code.

Not so, however, as to the pistol admitted. No proof whatever appears associating defendant with it. To connect him in any manner therewith it must be inferred that he either owned the

weapon or placed it in the toilet in which others were hiding, and from that again infer that the motive for which it was placed in the toilet was for its use in resisting arrest by the occupants, of which he was not one. This is not only too remote a circumstance to entitle the weapon to admission, but is in violation of the above section of the statute: State v. Hembree, 54 Or., 463. See also: 8 Cyc., 680; 6 Ency. Ev., 699; 2 Wigmore Ev., §1157, p. 135; McBride v. Commonwealth, 95 Va., 818; State v. Arthur, 129 Ia., 235; 63 State v. Kehr, 133 Ia., 35; Riggins v. State, 42 Tex. Crim., 472. Mr. Wigmore condemns the practice of admitting this class of testimony, and the Encyclopedia of Evidence above cited holds that, "As a circumstance tending to connect the accused with the act charged, it is competent to show his possession of a deadly weapon or instrumentality similar to that with which the homicide appears to have been committed, at the time thereof, or within a reasonable time previous or subsequent, or that he prepared such a weapon for use. But it is not proper to show the possession of a weapon with which the wound could not have been inflicted." The rule thus stated is fully sustained by the other authorities cited. Under the authority of State v. Wintzingerode, 9 Or., 153, we held this class of evidence in Yee Gueng to be admissible against those found in possession of the weapon, or in whose special hiding place it was discovered, but the same reasons cannot be invoked for its admission here.

That the admission of the weapon in evidence against this defendant must have prejudiced the jury against the accused seems clear—as much, if not more, than did the admission of the photographs admitted in evidence in State v. Miller, 43 Or., 325, on account of which a new trial was ordered. The observations in that case on this point apply with equal force here. After stating that photographs under some circumstances (concerning which the same may be here remarked with regard to firearms) are admissible, and after illustrating the class of cases in which they may properly be offered in evidence, Mr. Justice Wolverton on page 328 of the opinion remarks:

"But unless they are necessary in some matter of substance, or instructive to establish material facts or conditions, they are not admissible, especially when they are of such a character as to arouse sympathy or indignation, or to divert the minds of the jury to improper or irrelevant considerations." (Citing Baxter v. Chicago & N. W. R. Co., 104 Wis., 307; Selleck v. City of Jonesville, 104 Wis., 570; Fore v. State, 75 Miss., 727.)

So it may here be said that the admission of a weapon in evidence, not shown in any manner to be connected with this defendant, tended to divert the minds of the jury to improper and irrelevant considerations. Especially must this be true when it is remembered that the excluded box of weapons was, during a large part of the trial, permitted to remain in sight of the jury, to which was added the circumstance of the special counsel for the State requesting the witness by whom the revolver was identified to go to the box of weapons and take out this one, which the witness, in the presence

of the jury, did. All of this tended to direct the attention of the jury to the wholesale collection of weapons excluded, which
64 were clearly inadmissible—as much so as weapons found in a gunsmith's shop adjacent to a room occupied by one charged with murder.

Error is also predicated upon the remarks and interrogatories of the special counsel during the trial, much of which is set out in the former opinion in this case, the objection and consideration of which also excludes the alleged error of the court in admitting much of the cross-examination of Chin Ling, a witness for the state. The cross-examination of this witness, in my opinion, was permitted to be extended beyond reasonable limits. Much of it had no reference directly or indirectly to anything brought out on the direct examination. Regardless of this feature, however, the conduct of the special counsel, adverted to in the former opinion, in placing Jung Ah Poo upon the witness stand in the manner complained of, and in bringing matters before the jury by remarks and interrogatories (held to be highly improper, even though objections to much of the course pursued were sustained), manifestly tended to prejudice the rights of the accused, and while probably no one of the statements or remarks could be deemed sufficient to justify a reversal, yet taken as a whole they must, unless we disregard the legal rights of the accused, make a reversal necessary.

The impropriety and the prejudicial effect of the interrogations and remarks of the character complained of are fully and ably considered in People v. Wells, 100 Cal., 459. In that case the defendant was charged with forgery. A Mr. Staniels was put on the stand as a witness for the prosecution. Afterwards the captain of the police, as a witness for the state, was examined, and the prosecuting attorney asked him this question: "I want to ask one leading question, and do not answer it until counsel has an opportunity to object. Is it a fact that a short time after that Staniels came to you and reported about Wells wanting him to tell the woman to skip?" To this inquiry an objection was made and sustained. In referring to this interrogatory the Appellate Court observed:

"There was not the slightest excuse for asking this question * * * What, then, was its purpose? Clearly, to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in the manner attempted. And the wrong was not remedied because the court sustained an objection to the question."

The court then proceeds to discuss other interrogatories of like character, which it will be noticed were analogous in effect and propriety to those here under consideration, and the observations concerning which apply with equal force to those here presented, upon which a reversal is asked. Mr. Justice McFarland, beginning on page 461 of the opinion, remarks:

65 "The inexcusable asking of the foregoing question would not be, perhaps, of itself sufficient ground for reversing the judgment, but it is of importance when taken in connection with questions asked the defendant when a witness, as showing the gen-

eral manner and temper with which the prosecution was conducted. Upon cross-examination of appellant the prosecuting attorney asked him these questions: 'Where did you formerly reside? Do you know the Highland National Bank of Newbough, New York? Were you married to your present wife when you came here with her? Did you not admit in a letter to Mr. M. C. Belknap that in November, 1893, you forged your father-in-law's name to a note in New York?' To these questions counsel for appellant objected as incompetent, immaterial, irrelevant, and not in cross-examination; declared that they were unfair to appellant, and asked the court to instruct the district attorney not to ask any more such questions. The record merely shows that after discussion the objections were sustained. The first three of these questions are important mainly as leading up to the last one, the asking of which was utterly inexcusable and reprehensible. It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: "As, 'well we know;' or, 'We could, an- if we would;' or, 'if we list to speak;' or, 'There be, an- if there might.'" This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection—though we think it should have warned counsel against the course which he was taking—and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers; and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."

The holding in the above case is fully sustained by the great weight of authority. In fact but few cases may be found where a continued course or attempt to ask questions ruled out by the court, tending to convey to the jury matters not admissible in evidence,

and which, by their nature, are damaging in effect to the accused, have not resulted in a reversal. State v. Blodgett, 50 Or., 329; State v. Bartlett, 50 Or., 440; State v. Reed, 52 Or., 377.

As to other errors assigned I express no opinion. I deem the errors above considered ample to disclose that defendant did not receive the fair and impartial trial guaranteed by law to all persons, regardless of race or station in life, the recognition of which by the courts is essential to the safety of our citizens and to the perpetuity of our form of government.

The judgment should accordingly be reversed, and a new trial ordered.

Mr. Justice Slater concurs in this dissent.

66 Be it remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday the 3d day of October 1910.

Whereupon on this Saturday the 31st day of December 1910 the same being the 18th judicial day of said term, there were present:

Hon. Frank A. Moore, Chief Justice,
Hon. Robert Eakin, Associate Justice,
Hon. Thomas A. McBride, Associate Justice,
Hon. Woodson T. Slater, Associate Justice,
Hon. William R. King, Associate Justice, and
J. C. Moreland Clerk,

and when the following proceedings were had:

STATE OF OREGON, Respondent,
v.
LEM WOON, Appellant.

Appeal from Multnomah County.

Now at this time it is ordered by the court that the petition for rehearing pending in this cause, be and the same is in all respects overruled and denied.

67 SUPREME COURT, STATE OF OREGON, *ss:*

I, J. C. Moreland, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The State of Oregon, Plaintiff vs. Lem Woon, Defendant, save and except the Bill of Exceptions from the lower court filed in this court in said cause.

I further certify that the foregoing contains a copy of the opinion of the court rendered therein, and the judgment entered thereon, as the same appears of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of said court at my office in Salem, Oregon, this 28th day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk Supreme Court of Oregon.

68 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable Robert Eakin, Chief Justice of the Supreme Court of the State of Oregon:

The petition of Lem Woon, by John F. Logan, Frank F. Freeman, James E. Fenton and Ralph E. Moody, his attorneys, hereby sets forth that on or about the 31st day of December, 1910, the Supreme Court of the State of Oregon made and entered the final judgment herein in favor of the State of Oregon and against Lem Woon, defendant, which said final order and judgment affirmed the defendant's conviction in the Circuit Court of the State of Oregon for Multnomah County of murder in the first degree, in which final judgment and proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of Lem Woon, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

2.

That the said Supreme Court of the State of Oregon is the highest court of the State of Oregon in which a decision in this suit and this matter could be had.

69 Wherefore, Lem Woon petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Oregon for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 28th day of January, A. D. 1911.

LEM WOON,
By JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
His Attorneys.

Due and legal service of the above petition is hereby accepted and acknowledged for the State of Oregon this 28th day of January, 1911.

GEO. J. CAMERON,
District Attorney for the Fourth Judicial District of the State of Oregon.
A. M. CRAWFORD,
Attorney General of Oregon.

70 [Endorsed:] In Supreme Court State of Oregon State of Oregon, Pl'ff & Respondent, v. Lem Woon, Def't & Appellant. Petition for Writ of Error. Filed Jan. 28, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

71 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Assignment of Errors.

Now comes the above named defendant and files herewith his petition for writ of error, and says that there are errors in the records and proceedings of the above entitled cause, and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments:

The Supreme Court of the State of Oregon erred in holding and deciding that an act of the legislature of the State of Oregon, entitled "An Act to provide for criminal prosecutions on information made by the District Attorneys, to authorize District Attorneys to administer oaths or affirmation to witnesses and to compel them to testify, to further define contempts and the crime of perjury, and providing when the Circuit Court may convene a grand jury," approved by the Governor February 17th, 1899, is valid. The validity of said Act was denied and drawn in question by the defendant, on the ground of being repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

The Supreme Court of the State of Oregon erred in holding and deciding that the information charging the defendant with the crime upon which he was placed on trial was valid and conferred upon the court jurisdiction over the defendant and of the subject-
72 matter. The validity of said information and the jurisdiction of the court by the said information over the defendant or the subject-matter, was drawn in question by the defendant on the ground that such information was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof, it appearing from the record that the said information was neither verified nor under oath or

affirmation and that the defendant never had a preliminary hearing.

The Supreme Court of the State of Oregon erred in holding and deciding that the Circuit Court had jurisdiction to pronounce judgment against the defendant, and erred in sustaining the action of the Circuit Court in pronouncing judgment and sentence against the defendant over the objection of the defendant and erred in holding and deciding that the defendant should not be discharged. The jurisdiction of the Court, and its right to pronounce judgment against the defendant was denied and drawn in question by the defendant, on the ground that the same was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of the State of Oregon erred in holding and deciding:

First. That the Act of the Legislature of the State of Oregon, entitled "An Act to provide for criminal prosecutions on information made by the District Attorneys, to authorize District Attorneys to administer oaths or affirmation to witnesses and to compel them to testify, to further define contempts and the crime of perjury, and providing when the Circuit Court may convene a grand
73 jury," approved by the Governor February 17th, 1899, was valid, and that said Act did not abridge the privileges and immunities of citizens of the United States, and of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. That by the provisions of said Act the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Third. That the Supreme Court of the State of Oregon erred in holding and deciding that the information filed in the case, which charged the defendant with the crime for which he was placed upon trial, the said information being neither verified nor under oath or affirmation, and the defendant never having had a preliminary hearing, was valid and conferred upon the court jurisdiction over the defendant or of the subject-matter, and that the trial of the defendant upon said information did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That by a trial upon said information the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Fifth. That the Court had jurisdiction to pronounce judgment against the defendant and in pronouncing judgment and
74 sentence against the defendant and refusing to discharge the defendant, it appearing that at the time the appellant was charged with the offense involved in the case the act of the legis-

lature authorizing criminal prosecutions on information of the District Attorney was in force but prior to the sentence and entry of judgment against the defendant the Constitution of the State of Oregon had been amended, which amendment is now in full force and effect and was prior to the time that the defendant was sentenced and judgment entered against him, which amendment provided that no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor except by an indictment found by the grand jury. This amendment contained no saving clause, and the amendment therefore operated to repeal all the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment; and the Court erred in holding and deciding that the judgment and sentence did not abridge the privileges and immunities of citizens of the United States and of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States.

Sixth. That by such judgment and sentence the defendant is not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

Seventh. That the Court had jurisdiction over the defendant or the subject-matter.

Eighth. That the defendant was not entitled to be discharged and in refusing to discharge him.

75 Ninth. That the privileges and immunities of this defendant, as guaranteed by section 1 of the Fourteenth Amendment to the Constitution of the United States, were not abridged.

Tenth. That the defendant was not deprived of liberty and property without due process of law, as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

For which errors the defendant, Lem Woon, prays that the judgment of the Supreme Court of Oregon, dated the 31st day of December, 1910, be reversed, the information dismissed and held for naught, and that a judgment be entered for the defendant, Lem Woon.

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Defendant, Lem Woon.

Due and legal service of the above assignment of errors is hereby accepted and acknowledged for the State of Oregon this 28th day of January, 1911.

GEO. J. CAMERON,
District Attorney of the Fourth Judicial District of the State of Oregon.
A. M. CRAWFORD,
Attorney General of Oregon.

76 [Endorsed:] In Supreme Court, State of Oregon. State of Oregon, Pl'ff & Respondent, vs. Lem Woon, Def't & Appellant. Assignment of Errors. Filed Jan. 28, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

77 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Plaintiff and Respondent,
vs.
LEM WOON, Defendant and Appellant.

Order.

The above entitled matter coming on to be heard upon the petition of Lem Woon, appellant herein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oregon, and upon an examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter.

It is ordered, that a writ of error as herein prayed for be and the same is hereby allowed to this court from the Supreme Court of the United States and that the writ of error operate as a supersedeas.

Dated this 31 Day of January, A. D. 1911.

ROBERT EAKIN,
Chief Justice of the Supreme Court of the State of Oregon.

78 [Endorsed:] In Supreme Court, State of Oregon. State of Oregon, Pl'ff & Respondent, vs. Lem Woon, Def't & Appellant. Order. Filed Feb. 1, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy.

79 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the state of Oregon, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in

the said suit between the State of Oregon, the defendant in error and Lem Woon, the plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Lem Woon, the plaintiff in error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this be-
80 half, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, the 1st day of February, in the year of our Lord, 1911.

[United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk United States Circuit Court,
District of Oregon.

Allowed by—

ROBERT EAKIN,
Chief Justice of the Supreme Court
of the State of Oregon.

Due and legal service of the foregoing writ of error is hereby accepted and acknowledged, and copy received Feb'y 1st, 1911.

GEO. J. CAMERON,
J. J. FITZGERALD,
DAN J. MALARKAY,
Attorneys for the State of Oregon,
the Defendant in Error.
A. W. CRAWFORD,
Att'y Gen. Or.

81 [Endorsed:] In the Supreme Court of the United States. Lem Woon, Plaintiff in Error, vs. State of Oregon, Defendant in Error. Writ of Error. Filed Feb. 2, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy. Ralph E. Moody, Attorney at Law, McKay Building, Portland, Oregon.

82 In the Supreme Court of the United States.

LEM WOON, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the State of Oregon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Oregon, wherein Lem Woon, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert Eakin, Chief Justice of the Supreme Court of the State of Oregon, this 1st day of February in the year of our Lord, 1911.

ROBERT EAKIN,
Chief Justice of the Supreme Court of the State of Oregon.

Due and legal service of the foregoing citation is hereby accepted and acknowledged and copy received and appearance is hereby made in the Supreme Court of the United States, of the State of Oregon, the defendant in error herein, February 1st, 1911.

GEO. J. CAMERON,
J. J. FITZGERALD,
DAN J. MALARKAY,
Attorneys for the State of Oregon, the Defendant in Error.
A. W. CRAWFORD,
Att'y Gen. Or.

83 [Endorsed:] In the Supreme Court of the United States. Lem Woon, Plaintiff in Error, vs. State of Oregon, Defendant in Error. Citation. Filed Feb. 2, 1911. J. C. Moreland, Clerk of the Supreme Court, By Arthur S. Benson, Deputy. Ralph E. Moody, Attorney at Law, McKay Building, Portland, Oregon.

84 SUPREME COURT, STATE OF OREGON, *ss:*

I, J. C. Moreland, clerk of the said court, do hereby certify that there was lodged and filed with me as such clerk, in the matter of the State of Oregon v. Lem Woon the following papers:

1. The Original Petition for Writ of Error, with proof of service endorsed thereon;
2. The Original Assignment of Errors, with proof of service endorsed thereon;
3. Order allowing the Writ of Error.
4. The Original Writ of Error, with proof of service endorsed thereon;
5. The Original Citation with proof of service endorsed thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Salem, Oregon, this 28th day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

85 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same, save and except the Bill of Exceptions from the lower court on file in my office.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oregon, in the City of Salem, this 28 day of March, 1911.

[Seal Supreme Court, State of Oregon, 1859. The Union.]

J. C. MORELAND,
Clerk of the Supreme Court of Oregon.

Costs:

Cost of Transcript $45.00 paid by Ralph E. Moody of Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 22,605. Oregon Supreme Court. Term No. 261. Lem Woon, plaintiff in error, vs. The State of Oregon. Filed April 6th, 1911. File No. 22,605.

Office Supreme Court
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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error

vs.

STATE OF OREGON,
Defendant in Error

BRIEF FOR APPELLANT

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Plaintiff in Error.

(22,605)

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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error

vs.

STATE OF OREGON,
Defendant in Error

Writ of Error from the Supreme Court of the State of Oregon

BRIEF FOR APPELLANT

STATEMENT.

On the 1st day of April, 1908, there was filed in the office of the clerk of the Circuit Court of the State of Oregon for Multnomah County the information of the district attorney of the Fourth Judicial District of the State of Oregon, charging Lem Woon and Yee Gueng with the crime of murder in the first

degree. A severance was had and the defendants were tried separately. And thereafter on the 12th day of June, 1908, the trial of the defendant Lem Woon, the plaintiff in error, upon the information came regularly on before the court and jury, and thereafter on the 20th day of June, 1908, the jury found the plaintiff in error guilty as charged in the information; and thereafter on the 5th day of October, 1908, an order was entered upon the said verdict and directed that the plaintiff in error be on the 20th day of November, 1908, executed in the manner provided by law; and thereafter on the 24th day of October, 1908, the plaintiff in error appealed from said judgment to the Supreme Court of the State of Oregon; and thereafter on the 5th day of April, 1910, the Supreme Court of the State of Oregon rendered its decision affirming the judgment of conviction of and against the plaintiff in error; and thereafter a petition for rehearing was filed with the Supreme Court of the State of Oregon, which court on June 20, 1910, entered an order denying the petition and adhering to its former decision affirming the judgment of conviction; and thereafter on the 31st of January, 1911, a writ of error as regularly prayed and petitioned for was allowed by the Supreme Court of the State of Oregon, to the Supreme Court of the State of Oregon from the Supreme Court of the United States, which writ of error was duly and regularly thereafter issued in the manner provided by law on the 1st day of February, 1911.

SPECIFICATIONS OF ERROR.

I.

That the Supreme Court of the State of Oregon erred in holding and deciding that the act of the Legislature of the State of Oregon entitled, "An act to provide for criminal prosecutions, to authorize district attorneys to administer oaths or affirmations to witnesses and to compel them to testify, and further defining contempts and the crime of perjury, and providing when Circuit Courts may convene grand juries," approved by the Governor February 17, 1899, was valid, and that said act did not abridge privileges and immunities of citizens of the United States, and of this defendant, as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

II.

That the Supreme Court of the State of Oregon erred in holding and deciding that by the provisions of said act the defendant is not deprived of liberty and property without due process of law as guaranteed by said Fourteenth Amendment of the Federal Constitution.

III.

That the Supreme Court of the State of Oregon erred in holding and deciding that the information filed in this case, which charged the defendant with the crime for which he was placed upon trial, the

said information being neither verified nor under oath or affirmation, and the defendant never having had a preliminary hearing, was valid and conferred upon the court jurisdiction over the defendant or the subject-matter, and that the trial of said defendant upon said information did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV.

That the Supreme Court of the State of Oregon erred in holding and deciding that by a trial upon said information the defendant is not deprived of liberty and property without due process of law as guaranteed by the said Fourteenth Amendment of the Federal Constitution.

V.

That the Supreme Court of the State of Oregon erred in holding and deciding that the court had jurisdiction to pronounce judgment against the defendant, and in pronouncing judgment and sentence against the defendant, it appearing that at the time the appellant was charged with the offense involved in the case the act of the Legislature authorizing criminal prosecutions on information of the district attorney was in force, but prior to the sentence and entry of judgment against the defendant the Constitution of the State of Oregon had been amended,

which amendment is now in full force and effect, and was in full force and effect prior to the time that the defendant was sentenced and judgment entered against him, which amendment provided that no person shall be charged in any Circuit Court with the commission of any crime or misdemeanor except by indictment found by the grand jury. This amendment contained no saving clause, and the amendment therefore operated to repeal all the laws in conflict therewith, which repeal took effect immediately upon the adoption of the amendment, and the court erred in holding and deciding that the judgment and sentence did not abridge the privileges and immunities of citizens of the United States and of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI.

That the Supreme Court of the State of Oregon erred in holding and deciding that by such judgment and sentence the defendant is not deprived of liberty and property without due process of law as guaranteed by said Fourteenth Amendment to the Federal Constitution.

VII.

That the Supreme Court of the State of Oregon erred in holding and deciding that the court had jurisdiction over the defendant and the subject-matter.

VIII.

That the Supreme Court of the State of Oregon erred in holding and deciding that the defendant was not entitled to be discharged, and in refusing to discharge him.

IX.

That the Supreme Court of the State of Oregon erred in holding and deciding that the privileges and immunities of this defendant as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States were not abridged.

X.

That the Supreme Court of the State of Oregon erred in holding and deciding that the defendant was not deprived of liberty and property without due process of law as guaranteed by the said Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

The act of the Legislature of the State of Oregon, approved February 17, 1899, authorizing criminal prosecution on information by the district attorney is as follows:

Section 1. Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file in the proper Circuit Court an information charging any person or persons with the commission of any crime defined

and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed.

Section 2. Information shall be substantially in the form prescribed in Section 1269 (70) of the criminal code of the State of Oregon as compiled and annotated by W. Lair Hill, except the words "district attorney" shall be used instead of the words "grand jury" wherever the same occur. And the manner of stating the act constituting the crime as set forth in the appendix to said criminal code shall be sufficient in any such information in all cases where the forms there given are applicable; and in other cases forms may be used as nearly similar as the nature of the case shall permit.

Section 3. From the time any information is filed as provided in this act the same shall be construed like an indictment, and shall be deemed to be in all respects the same as an indictment within the meaning of the present statutes of this state, and thereafter until and including final judgment and execution. The same proceedings shall be had, and with like effect, as in cases where indictments are returned by a grand jury; provided, that when a defendant has been held to answer, as provided in Chapter XXXVII of said criminal code, the information against him shall be filed on or before the first day of the next regular term of the Circuit Court before which he is required to appear, unless such Circuit Court, upon good cause stated by the district attorney, shall extend the time; otherwise,

on the second day of such term, or at the expiration of the time so extended, the court must order that the defendant, if in custody, be discharged, or if he has given bail that his sureties be exonerated or money deposited in lieu of bail be refunded. But such order shall not be a bar to another prosecution for the same crime unless it shall be a misdemeanor.

Section 4. Any person within this state can be compelled by subpoena to appear before a district attorney to testify as a witness, in like manner as before a grand jury, concerning any crime inquired of by such district attorney, and any district attorney shall have power to administer oaths or affirmations to witnesses and to compel them to testify. If any person to whom a district attorney has administered an oath or affirmation shall willfully testify falsely as to any matter material to the inquiry being made by such district attorney, such person shall be deemed guilty of perjury, and shall be punished accordingly; and the refusal to be sworn or to testify as a witness before a district attorney shall be deemed a contempt of the Circuit Court of the county in which such refusal shall occur, and shall be punishable accordingly.

Section 5. The name of each witness examined on oath or affirmation by a district attorney in the support of any information shall be inserted at the foot of such information or endorsed thereon before the same is filed, otherwise the testimony of such witness cannot be heard against the defendant at the trial of such information.

Section 6. The district attorney may also file an information in manner and form as provided in Sections 1 and 2 of this act in the following cases: (1) Whenever an indictment returned by a grand jury has been set aside, or a demurrer thereto sustained, and the grand jury returning the same is not in session or has been discharged; (2) when a case has been appealed to the Supreme Court and reversed on account of any defect in the indictment or information; (3) when an information filed as hereinbefore provided has been set aside, or the demurrer thereto sustained, and the court grants leave for or directs the filing of another information.

Section 7. This act shall not prevent the Circuit Court from convening a grand jury whenever in its opinion it is deemed advisable to do so.

The Supreme Court of the State of Oregon in **State v. Tucker, 36 Ore. 291**, and in **State v. Guglielmo, 46 Ore. 250**, sustained the constitutionality of the law authorizing district attorneys to file informations. And the Supreme Court of the State of Oregon in the case of **State v. Belding, 43 Ore. 95**, held that one may be proceeded against by information without having been examined before a magistrate, and that one may be charged by information without having had a preliminary examination; and in the case of **State v. Guglielmo, 46 Ore. 250**, the Supreme Court of Oregon held and decided that an information filed by a district attorney required no verification other than the official oath of the district attorney.

We therefore have the question presented to this court in this case under the first, second, third and fourth assignments of errors whether a statute which authorizes and permits a district attorney to file an information against one, charging him with a felony, without leave of court and without the necessity of a preliminary hearing or the privilege or opportunity of waiving one, unsupported by any oath or affirmation other than the official oath of office of the district attorney is constitutional, and not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and does not deprive one of his liberty and property as guaranteed by the Fourteenth Amendment to the Federal Constitution.

This court in **Hurtado v. The People of the State of California, 110 U. S. 516,** held that the words "due process of law" in the Fourteenth Amendment to the Constitution of the United States do not necessarily require an indictment by the grand jury in a prosecution by the state for murder, and affirmed the conviction upon such information for murder in the first degree and sentence of death thereon, which prosecution by information was authorized by the penal code of the State of California, within the authority of the Constitution of California permitting prosecution for felony by information after examination and commitment by a magistrate.

In the Hurtado case it is to be noted that the court is careful to make mention that before a district attorney could file his information it was necessary that there be a preliminary examination, and

in the subsequent decisions of this court, in which the Hurtado Case has been reaffirmed and applied, it will be observed that a preliminary examination in each of the cases was necessary to be had, or the opportunity offered of waiving it before the prosecuting officer would be authorized to file his information. But under the law of the State of Oregon as construed by the Supreme Court of this state, which construction, under the familiar rule, this court is bound by, it is not necessary that the accused be given a preliminary examination or be offered the opportunity of waiving one.

The fact that the plaintiff in error waived a preliminary hearing does not affect the question suggested as to the validity of the law, for under the law as hereinbefore stated such preliminary hearing is not required. For this reason this law gives arbitrary and despotic power to a prosecuting officer, and is essentially different from the law of California which was sustained by this court, and is objectionable for lack of the very elements of the California law which this court was careful to make mention of in order to support its decision. Under this statute, in the language of the Supreme Court of the State of Oregon in the case of **State v. Belding, 43 Ore. 99,** "It is possible that a district attorney * * * might cause one to be arrested and without preliminary examination be lodged in jail, charged by the district attorney with a non-bailable crime (Constitution of Oregon, Article I, Section 14), to abide the result of his trial in the Circuit Court upon an information, thus depriving him in the meantime of

any opportunity to establish his innocence; and though the letter of the law may have been strictly kept by the procedure adopted, the spirit of fairness that has ever characterized American jurisprudence as applied to criminal prosecutions would thereby be grossly violated." Again, "It must be admitted that the act of 1899 under consideration vested the district attorney with vast power, which, if oppressively exercised, might possibly abridge the constitutional right of one accused of a crime to demand the nature and cause of the accusation against him." And the court further observed in that case: "The right of the Legislative Assembly to prescribe the manner of procedure in the trial of criminal actions, when not violative of an organic act of the state, is conceded; but as the practice under the act of 1899 has evoked much criticism from the members of the bar, upon the theory that the district attorney has been clothed with too much power, an amendment of that act, so as to make it conform to and bring it in harmony with the spirit of the age, would undoubtedly conduce to the general welfare of the state and safeguard the interest of those persons who may be accused of the commission of crimes upon information."

Arbitrary power in a single individual to bring a citizen into court and place him on trial for a crime is so contrary to the spirit of the Fourteenth Amendment as to be considered obnoxious to the provisions of that article. **In re Humason, 46 Fed. 388-390.**

The Supreme Court of the State of Montana in the case of **State v. Brett, 16 Mont. 360, 40 Pac. Rep. 873,** holds that under the constitution of that state

allowing criminal actions to be prosecuted by information "after examination and commitment by a magistrate or after leave granted by the court" an information may be filed with leave of court without examination and commitment. It will be noted, however, that the court makes particular mention of the fact that where an investigation into one's guilt or innocence is had before a committing magistrate and a commitment is the result, such judicial inquiry is sufficient to justify the county attorney in prosecuting in the district court without obtaining leave of that court to file an information formally charging the defendant with the offense for which he was examined, observing "the prosecution rests in the guaranty of the right to a judicial review of the matter by an impartial magistrate." And the court further observed: "Where no examination has been had before a magistrate, and no commitment has been made in such a case to protect the rights of the defendant and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained, thus again there is a guaranty that a judicial order will be required before there can be even a charge preferred." And the court in that case further observes: "Guided by the discussions and logical reasoning of such constitutional expounders as Justices Miller and Bradley, we are of the opinion that by the clause under discussion the framers of the constitution of the state formulated a somewhat new and presumably improved procedure in criminal

cases, limited, but general in its application; always circumscribed in its operation by depending upon the sound approval of the court before its power may be legally invoked to charge a citizen with crime who has never had the opportunity of a hearing before a committing magistrate, or whose conduct has not been investigated by a grand jury."

In the case of **In re Dolph, 17 Colo. 35, 28 Pac. 470,** the Supreme Court of Colorado held that a felony may be prosecuted by information where the probable guilt of the accused had been ascertained and certified by a previous preliminary examination. We particularly call the court's attention to this case, for an examination of it discloses the fact that the information law was sustained only upon the ground that before the same could be filed it was necessary that the accused be afforded a preliminary examination.

It is respectfully submitted that the plaintiff in error has been deprived of his liberty without due process of law, and that the decision of the Supreme Court of the State of Oregon sustaining the validity of the act authorizing criminal prosecutions on information by the district attorney was erroneous and should be reversed.

Respectfully submitted,

JOHN F. LOGAN,
FRANK F. FREEMAN,
JAMES E. FENTON,
RALPH E. MOODY,
Attorneys for Plaintiff in Error.

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IN

The Supreme Court

of the United States

October Term, 1912

No. 261

LEM WOON,
Plaintiff in Error,

vs.

STATE OF OREGON,
Defendant in Error.

In Error to the Supreme Court of the State of Oregon

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE

On March 3, 1908, Lem Woon, Plaintiff in Error, was accused by a duly verified complaint made to and filed with the Judge of the Municipal Court of the City of Portland, who was, by virtue of his office, a committing magistrate under the Oregon statutes, with the crime of murder in the killing of Lee Tai Hoy, and, having been

arrested and brought before said Magistrate, waived examination and was held to answer for said charge. (See pages 13 and 14 of Transcript of Record.)

On April 1, 1908, the District Attorney of the Fourth Judicial District of the State of Oregon filed in the Circuit Court for Multnomah County an Information charging said Lem Woon with said crime of murder; and thereafter said Lem Woon was tried and convicted in said Court of said crime with which he was so charged by said information. (See pages 2 to 9 of Transcript of Record.)

From said judgment of conviction Lem Woon appealed to the Supreme Court of the State of Oregon; and upon said appeal said Court affirmed said judgment; and said judgment of affirmance so rendered by said Supreme Court is, by Writ of Error, brought here for review.

At the time said Information was so filed by said District Attorney the Oregon statutes authorized prosecutions by and under such an Information. The only provision of said statutes necessary to quote here is Section 1 of the Act of 1899—known and hereinafter referred to as the "Information Law"—which is found on page 99 of the 1899 Session Laws and in Section 1258 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon, and which reads as follows:

> "Hereafter it shall be lawful for the district attorney of any judicial district of this state, and it is hereby made his duty, to file, in the proper circuit court, an information charging any person or per-

sons with the commission of any crime defined and made punishable by any of the laws of this state, and which shall have been committed in the county where the information is filed."

There was nothing in the provisions of the Constitution of Oregon allowing the enactment of said Information Law nor in said Information Law itself which required any examination before or commitment by a magistrate as a condition precedent to the institution of a prosecution in the Circuit Court by an Information filed by the District Attorney.

On June 1, 1908, after said Information had been so filed against Lem Woon and before he was tried and convicted thereunder, Section 18 of Article VII of the Constitution of Oregon, under the previous wording of which prosecutions by Information were allowable, was amended so as to include therein a clause reading as follows:

"No person shall be charged in any Circuit Court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this State, except upon indictment found by a Grand Jury."

By his petition for the Writ of Error issued herein and his Assignment of Errors filed therewith two questions are presented for the consideration of this Court. The first contention is that, independent of the above mentioned constitutional amendment, the prosecution of Lem Woon under said Information Law in the manner

above stated was repugnant to and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the second contention is that the prosecution should not have been continued under said Information after the Oregon Constitution was amended as above stated and that the continuance of such prosecution was also repugnant to and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

We have not yet received or had an opportunity to read the brief of Plaintiff in Error, and in writing this brief we must assume that the argument in his brief will be such as is suggested by the wording of the Assignment of Errors and the oral statements made to us by opposing counsel of the points intended to be raised thereby.

Because this Court has, in the late case of **Ross v. Oregon, 227 U. S. 150,** decided the identical question raised by the above mentioned second contention adversely to such contention, and because counsel for Plaintiff in Error have informed us that they do not intend to undertake any reargument of that question in this case, our argument herein will be confined to the above mentioned first contention.

ARGUMENT.

In the following cases the Supreme Court of Oregon sustained the validity of the Information Law in question and held that it did not violate any provision of

either the Constitution of Oregon or the Constitution of the United States:

State v. Tucker, 36 Or. 291;
State v. Belding, 43 Or. 95;
State v. Guglielmo, 46 Or. 250;
State v. Ju Nun, 53 Or. 1.

Following its holdings in the four above mentioned cases, said Supreme Court decided the question now under consideration against the contention of Plaintiff in Error when the same was presented to it in this case.

In **Hurtado v. California, 110 U. S. 516,** this Court held that the Fourteenth Amendment to the Constitution of the United States does not require an indictment by a Grand Jury in a prosecution by a State for felony and that a statute authorizing such a prosecution by an Information was not repugnant to said Amendment.

Adhering to the decision in the **Hurtado Case** this Court has sustained the validity of Information Laws of various states in the following later cases:

McNulty v. California, 149 U. S. 645;
Hodgson v. Vermont, 168 U. S. 262;
Bolln v. Nebraska, 176 U. S. 83;
Maxwell v. Dow, 176 U. S. 581;
Davis v. Burke, 179 U. S. 399;
Dowell v. United States, 221 U. S. 325.

The proposition urged by Plaintiff in Error, as we understand it, is that, through a prosecution by Information after examination and commitment by a Magistrate is "due process of law," the prosecution of Lem Woon under said Oregon Information Law was not

"due process of law" because said Oregon information law did not require such an examination and commitment by a Magistrate as a condition precedent to the filing of the Information by the District Attorney.

Upon this particular phase of the question the Oregon Supreme Court in **State v. Tucker, 36 Or. 291-302,** spoke as follows:

> "It may be a matter about which reasonable minds may differ, whether he should have a preliminary examination before being subjected to an accusation and public trial before a court of justice, or as to the appropriate steps to be taken before an information may be preferred. But these matters are legislative in their import—made so necessarily, under the constitution, by virtue of the power given to modify grand juries; and, while the wisdom of the law may be a subject of dispute, the authority to enact it cannot be gainsaid."

And in **State v. Belding, 43 Or. 95,** it was expressly and directly held that the District Attorney could file an information without the defendant having had a preliminary examination before a Magistrate and that the Oregon Information Law was not invalid because it permitted that official to do so.

It is true that the provision of the California Constitution and the statute adopted thereunder, which were considered in the **Hurtado Case,** required an examination and commitment by a Magistrate as a condition precedent to prosecution by Information; but there is nothing in the reasoning of or the authorities cited in the opinion in that case which make it any less

applicable to a law authorizing prosecutions by Information without such preceding examination or commitment than to the particular law under consideration therein; and the authorities and reasoning and conclusions of said opinion would as much sustain the validity of the Oregon Information Law as they do sustain the validity of the California Information Law. Nor is there any expression in any later decision of this Court sustaining the validity of prosecution by Information which warrants the distinction undertaken to be made in this case between an Information Law which requires an examination and commitment by a Magistrate to precede the filing of the Information and an Information Law that does not require such.

Is a defendant who is convicted under prosecution by an Information deprived of his life or liberty "without due process of law" if he has not been examined or committed by a Magistrate before said Information is filed against him? That is the specific question in this case; and the answering thereof involves a consideration of the meaning of "due process of law."

In **Missouri v. Lewis, 101 U. S. 22,** this Court said:

> "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to pre-

vent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In **Hurtado vs. California, 110 U. S. 516,** this Court said:

"The natural and obvious inference is that, in the sense of the constitution, "due process of law" was not meant or intended to include, **ex vi termini,** the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to the law of the land in each state which derives its

authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."

In **Ex parte Converse, 137 U. S. 624,** this Court said:

"Appellant has been subjected, as all persons within the state of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void. We repeat, as has been so often said before, that the fourteenth amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state."

In **Caldwell v. Texas, 137 U. S. 692,** this Court said:

"By the fourteenth amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state,

the constitutional requisition is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

In **Leeper v. Texas, 139 U. S. 462,** this Court said:

"It must be regarded as settled that whether the statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States, and that by the fourteenth amendment the powers of state in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law, and that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

In **Brown v. New Jersey, 175 U. S. 172,** this Court said:

"The state is not tied down by any provision of the federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of

the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a state to abolish the grand jury entirely and proceed by information."

In **Maxwell v. Dow, 176 U. S. 581,** this Court said:

"The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment (referring to the Fourteenth Amendment) there can be no just fear that the liberties of the citizen will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal government."

That any defendant fairly and regularly tried and convicted under the Oregon Information Law is not de-

prived of his life or liberty without "due process of law" seems too clear under the definitions and explanations of that phrase contained in the foregoing quotations from decisions of this Court to require argument. If the State of Oregon can deny a trial by a jury to a person accused of violating one of its penal statutes, it certainly can prosecute such a person by Information without his being first examined and committed by a Magistrate.

Lem Woon was prosecuted in the same way and under the same law that all other offenders of Oregon were being prosecuted at the time that he was prosecuted—the only difference being that many were informed against without being first given the opportunity of having a preliminary examination before a Committing Magistrate, an opportunity which he voluntarily waived. J. Thorburn Ross, whose conviction was affirmed by this Court in one of the cases above cited, was prosecuted and convicted under the same Oregon Information Law.

Lem Woon is not being arbitrarily deprived of his life. No different or higher punishment is being imposed on him than on others for like offenses. The Oregon Information Law operated on all alike and was not applied in his case so as to subject him to any arbitrary exercise of the powers of government.

Even if it were held that the Fourteenth Amendment would be violated if a defendant were prosecuted by Information without examination before and commitment by a Magistrate, such holding would not secure

a reversal of the judgment of the State Court convicting Lem Woon; for the record shows that he was committed by a Magistrate and that the only reason why there was no examination before such commitment was that he voluntarily waived such examination.

Though the identical question raised here may not already have been decided by this Court because not previously raised therein, it has been decided by the Courts of last resort in other states than Oregon. Amongst other cases holding in accordance with **State v. Tucker, 36 Or. 291**, are: **State v. Sureties of Krone, 4 Wyo. 347; State v. Brett, 16 Mont. 360**; and **State v. Anderson, 30 La. Ann. 557.**

In said Wyoming case Chief Justice Groesbeck, after reviewing and discussing many of the decisions concerning the validity of prosecution by Information, said:

> "Although these cases intimate very clearly that the courts have regarded with much dislike a proceeding by information by a single official without a previous judicial inquiry as to probable cause of guilt, as we did in the case of In re Wright supra, it has never been held, in any case which we have found, after the most diligent search, that such a provision, however caustically it has been condemned as unwise or harsh, is obnoxious to the constitutional guaranty that no person shall be deprived of life or liberty without due process of law, or any other constitutional safeguard erected for the protection of the citizen."

We respectfully submit that there is neither reason nor authority to sustain the contention of Plaintiff in

Error and that the judgment of the State Court should be affirmed.

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